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THE PURPOSES OF CRIMINAL PUNISHMENT *

II. The Impact of Penology

Before I turn to the various methods by which the results of penal methods can be assessed, I ought perhaps to give a general warning that *whatever* the courts do, the general impact on the total volume of crime is not likely to be sensational. The many and complex factors which operate in the aetiology of crime in modern society are much more powerful than the inhibitory pressures which can be brought to bear upon them. We know little about the real effect of a high degree of industrialisation on mental health; we do not know what price we must pay for the constant uprooting of modern life, the destruction of small, intimately known communities. We cannot estimate the degree of anxiety which better educational opportunities and greater social mobility arouse; we ignore the results of work becoming more monotonous and less creative, and of leisure becoming less re-creative. We do not understand all the implications of the emancipation of women and the consequent change in the status of wives and mothers within the family unit. All these, together with the tempo of modern life and the need to make more and more rapid adjustments to quickly changing situations, subtly and in different ways affect the incidence of delinquency, often through more directly related aetiological factors, such as broken homes or biological and psychological inferiority and abnormality.

Having put in this caution about the *total* effect of penal measures on crime, I will now consider how one might assess the effect of a particular measure on particular individuals.

The most obvious method is, of course, the reconviction rate. The 1955 Report of the Prison Commissioners for England and

* Founded on University of London Special Lectures in Laws, delivered at University College, London, in February, 1957.

Wales,[1] for instance, in the Appendix to Chapter 4, gives reconviction statistics divided into type of institution on the one hand, and type of prisoner on the other. You can see, just to give an example, that the percentage of "stars" (that is, offenders sent to prison for the first time) reconvicted after their discharge in 1950 from Open Regional Training Prisons is 16 per cent. The comparable figure from Medium Security Regional Training Prisons is 23 per cent. Or again, the percentage of "ordinaries" (that is, recidivist prisoners) in the same period from Open Regional Training Prisons is 19 per cent., and the comparative figure for Closed Regional Training Centres is 34 per cent.

This would seem to show that open prisons give better results than medium-security or closed prisons, and indeed we hope it is so. Nevertheless, to assert that it must be so would be a *post hoc, ergo propter hoc* argument. Those who are sent to open prisons are specially selected; they are already men of better personality and one would expect them to do better even in a medium security or a closed prison. Quite how much the actual régime itself contributes to their later lawful behaviour, and how much good there was already in them, is difficult to know. And if it was not something in the man himself, but mainly the sentence that caused him to go straight, we still do not know how much was due to the shock of public exposure and trial, and how much to the training received in prison. Moreover, if it was something to do with the period of imprisonment, was it some purely fortuitous circumstance such as a chance meeting resulting in a friendship, or was it the specific content of the training? Alternatively, how far was the decisive factor one of spontaneous maturation, irrespective of the actual training as outlined for example, by Sheldon and Eleanor Glueck in their work on the *After-Conduct of Discharged Offenders*? Finally, how much of the "success" was due to after-care, or to favourable circumstances on release; and conversely, how much of the "failure" was not so much lack of training as lack of proper after-care and hostility or reluctance on the part of society to re-absorb the offender?

There is no answer to these imponderables. Reconviction statistics, therefore, though they are very badly needed, and do give some indication, are not enough by themselves. We need to study and understand the dynamics of treatment much more carefully and at close quarters so that the impact on the individual offender could be seen better. Above all, however, we need comparative result studies.

Such studies are made by comparing like with like, as far as that is possible. If we want to know which of two methods gives the better result, we must measure its impact on offenders who are reasonably alike. Suppose, for example, we want to find out whether

[1] Report of the Commissioners for Prisons, 1955, H.M.S.O.

probation or imprisonment gives better results, what we would have to do is to pick offenders of the same age group, and from their records we can then match them for similar background and other factors which might be important—perhaps physique, mental capacity, social status of the home, and so forth. If, on such a basis, we compare the results of imprisonment with probation, we get a much clearer picture of which is more successful with that particular type of offender than the ordinary reconviction statistics would give us.

This kind of sorting out process is really also the basis of what are called prediction methods, such as the recent study by Mannheim and Wilkins on *Prediction in relation to Borstal Training*. The material for that investigation was contained in the dossiers of 700 lads sentenced to Borstal Training. From these records some sixty background factors were obtained and their relationship to each post-Borstal failure or success was carefully measured. From this emerged a small number of highly significant factors, such as, for example, the lad's work record.

From these factors (which were calculated *backwards*), it is possible, in new cases, to calculate *forwards* (rather in the way in which the risks of an insurance company are calculated by actuaries) just what the chances are which various types of boys have of succeeding. What happens is that each factor is given a number which is arrived at after careful statistical calculation. As the histories of different boys show the presence or absence of these various factors, so their numbers are added until each lad has a score. This scoring is really a method of classification, and will place the lad into one of five groups. Of the boys who fall into group A (the best group) seven out of eight will be successes. On the other hand, seven out of eight in group D (the worst group) will be failures.

Once a prediction table has been worked out by the statisticians, it is quite simple to calculate which group a particular lad falls into. Now I want to stress that all a prediction table does is to predict the *probability* of failure or success, or, for that matter, of the probability or otherwise of future delinquency in children, as in the now famous work by Sheldon and Eleanor Glueck on *Unravelling Juvenile Delinquency*.

Prediction techniques do not, of course, *eliminate* the need for personal judgment, but they are a most valuable supplement to it. However, a good many people regard them with great suspicion because they feel such methods are in some way inhuman and mechanical. Yet the choice made, for instance, by a juvenile court about the most effective treatment method, or by a Borstal governor about the right time for release, is based on experience; and that is simply another way of saying that the human brain refers back to memory for a statistical analysis on past failures and successes. The difference is that the judgment of the court, or the Borstal

governor, is impaired by subjective matters, such as whether they like the look of a particular lad or not. However distasteful it may be to our pride, the predictor is more efficient than our brain, and the results speak for themselves.

For example, the Mannheim-Wilkins prediction table has proved to be nearly four times as accurate as the opinion of Borstal governors and house masters, in spite of the fact that it is based only on information available to the court at the time of sentence. Again, Thompson [2] checked the effectiveness of the Glueck social prediction scale with that of a clinical study by a team of three experts,[3] a psychiatrist and two psychologists, in a study published in the *British Journal of Delinquency*. No information about the personalities or background of the boys, apart from the facts called for by the table, were made available to the predictor. The clinical team, on the other hand, had had the advantage of personal interviews and all the information which could be collected, as well as consultation with each other. It was nevertheless found that whereas the tables gave a correct prediction about subsequent delinquency or non-delinquency in 91 per cent. of the cases, the three clinicians were successful in only 54, 56 and 62 per cent. respectively of their predictions.

In the United States, prediction tables have been constructed to predict response to probation, for selecting prisoners for parole, and for identifying probable adult recidivists. A prediction study on Approved Schools is now being completed in this country; and there is no doubt that they are a valuable diagnostic instrument, both for the use of the courts and for penal administrators.

This brings me to the whole question of the diagnostic facilities which are available to the courts, and indeed to the fitness of courts of law to prescribe the treatment of offenders. In most penal systems there has in fact been a steady tendency to take away, not the power to decide upon guilt or innocence, but to determine the precise nature of the treatment. A man is sentenced to imprisonment, but whether he serves his sentence in a closed, a semi-open, or a completely open institution is nothing whatever to do with the court. That decision depends on the judgment of those who are actually concerned with his treatment. Not even the length of the sentence is always determined by the courts. A lad who is sent for Borstal training will serve a minimum of nine months or a maximum of three years, but the precise date of his release is determined by those who are most intimately concerned with him, and in a far better position to judge his response to treatment, and his general progress, than the courts. The same applies to Approved Schools and even to Preventive Detention.

[2] R. E. Thompson, "A Validation of the Glueck Social Prediction Scale for Proneness to Delinquency," *British Journal of Delinquency*, Vol. 3 (1953), pp. 289 *et seq.*

[3] Powers, E., and Witmer, H., *An Experiment in the Prevention of Delinquency*, 1951.

However, in some countries things have gone much further than that. As you know, children below the age of puberty are in most countries not dealt with by criminal courts at all, but either by child welfare boards, as in Scandinavia, or by chancery courts, acting *in loco parentis*, as in the United States. But in 1940 the American Law Institute proposed the setting up of Youth Authorities for adolescents up to the age of twenty-one, to which young offenders would be sent after having been convicted by a court of law, for careful diagnosis and the decision as to what treatment was required. This system was in fact adopted in California, Wisconsin, and Minnesota.

The Californians went even further than that. On the one hand they extended the powers of the Youth Authority to deal with children also and took over treatment as well as diagnosis; on the other hand and even more boldly, they set up an Adult Authority with similar powers.

The Californian system has advantages and disadvantages. The advantages are that, having made a diagnosis and decided on a form of treatment, the same Authority can actually follow up to see how that treatment is working out in practice. It has always been one of the drawbacks of our own judicial and penal systems that the court, having decided on treatment, does not know what happens to the offender; and magistrates and judges still have comparatively little knowledge of precisely what imprisonment really means, or what treatment facilities are actually available. By contrast, in most Continental countries it is possible to be a judge one day, and a penal administrator the next, and after some years' experience of running prisons, to move back to the bench again, since both courts and prisons come under a Ministry of Justice.

The Californian system goes even further in that it permits not only a follow up of cases, but the possibility of altering the treatment if it is not successful. This is, of course, analogous to the approach of the doctor to his patient: if the germs prove resistant to penicillin, then one of the other drugs will probably do the trick.

There are, however, some grave objections to the Californian system. The most important of these is the issue of civil liberties. The expert, the member of a Committee or a Treatment Authority, even the doctor and the social worker, are as prone to abuse their power (which is not confined to diagnosis as in a court of law, but to treatment) as the next man. What if some offenders should prove unpromising material for treatment? Are they to be subjected to unlimited experiments? Are they to be kept locked up for ever? Have they lost all their rights and must they be helpless at the mercy of even the most benevolent psychiatrists?

I do not think that in this country we shall be eager to adopt such a system from which, incidentally, there is no appeal to a court of law. I think that the development lies in an extension of the system whereby the court fixes the maximum length of sentence but

leaves the detailed application of treatment and possibility of earlier release to those with experience in actual dealing with the offenders.

That is, in fact, precisely the way in which matters have developed. For instance, once the decision that a boy should be sent to an Approved School has been made, the more detailed decision as to exactly what type of school he should go to is now taken by one of the Classifying Schools. At these schools, as you know, very careful inquiries are made into the boy's personality and background, and once his needs are known and understood he is sent to that school which is best able to cater for his special requirements. A similar system of classification and allocation is in force for Borstal lads and also for corrective trainees.

There can be little doubt that the classifying system has improved the standard of training, particularly in the Approved Schools. However, there are certain dangers to which the present methods of classification might lead. One of these is over-specialisation. For example, you might get a school which has the right personnel and facilities for the training of backward boys. If the school is then sent nothing but backward boys you might get a situation where some of these boys feel they are doing quite well in the sheltered surroundings of that school, only to find that when they come out, they cannot compete in the ordinary world after all. The plain fact of the matter is that we do not yet know much about deliberate grouping, about the purposeful mixing of some types of boys with others, about whether we should have inadequate and aggressive boys in the same group, and if so, in what proportion. These are the kind of problems which Mannheim and Spencer have analysed so interestingly in their pamphlet on classification, published by the Institute for the Study and Treatment of Delinquency. They are some of the key problems of the future, for grouping is likely to play a decisive part in institutional treatment.

It is to the future of institutional treatment, and in particular to the future of prison treatment, that we must now turn.

The problem is how to turn something which is still largely negative into something which is positive; or to put it into other words, how to change a mainly custodial regime into a remedial and rehabilitative period of training.

The general position is, as you know, first of all that our prisons are greatly overcrowded. The present daily average population of the prisons in England and Wales is about 20,000 whereas before the war it was about 10,000. The reason for the doubling of the prison population is not so much that more are sentenced—the number of prison sentences is only 20 per cent. higher than before the war—but that the sentences imposed are longer.

Why they are longer is something of a mystery. It is quite true that there has been a rise in more serious crime, but that rise in no way accounts for sentences which are now as much as five times as long as before the war. T. S. Lodge, the Statistical

Adviser to the Home Office, has made an instructive comparison between England and Scotland in a recent article in the *British Journal of Delinquency*. It shows that the average length of sentence for the offence of house-breaking, for example, is three-and-a-half times as great in England and Wales as in Scotland; and that, to give another example, the proportion of prisoners serving long sentences of three years and over in England and Wales is double that in Scotland.

This excessive proneness on the part of our higher courts to impose very long sentences is the main reason for the overcrowding in our prisons. Since the shortage of work and the lack of staff are in themselves consequences of the overcrowding, I wish that courts of assizes and quarter sessions were more aware of the difficulties which their sentencing policy creates. These difficulties are all the more obvious when one remembers that almost all our gaol buildings are now a hundred years old, or more; and that 2,000 men have to sleep three in a cell thirteen feet by nine feet by seven feet.

Young and active men and women may be locked up for seventeen or eighteen hours a day, and much longer on a Sunday, in some of our local prisons. After spending years being told exactly what to do, when to do it, how to do it, with no decision to make, no choice to face, no responsibility to shoulder, they are then pushed abruptly into a hostile world where they are labelled ex-prisoners and may have to fight every step of the way to win back some sort of acceptance.

Consider the value which society appears to place on effort and honest hard work if a full working day consists of only four or five hours, as is the case in local prisons; and if all that can be earned by sticking at a job is only two or three shillings a week. Think of the man who is a heavy smoker in such a situation. Is it any wonder that there is a black market in tobacco; that wangling and jockeying to get into a position of privilege in the stores, or the kitchen, or the library where you are in touch with the things that matter in the economy of a penal institution, seems more important to many prisoners than to do a proper day's work? "Prisoners," Sir Lionel Fox has once said, "are adept at wasting time unobtrusively"; and everything in the local prison system conspires to make them so.

To all these negative influences must be added the influence which prisoners have on each other. When there is so little incentive to be good, there is plenty of pressure to become bad. The prisoner community is a small world on its own, rigidly cut off from the outside world and normal social contacts, idle for a good deal of the time, and dependent upon its own resources. The values and ideals of this community are criminal, and it strives to keep them so; indeed to assert them in defiance of authority. Its leaders are those who have been most successful in crime, or in defying the authorities. There is an aristocracy of prisoners which begins

with the safe-breakers, the daring and highly skilled men who plan their coups for weeks and months, and stand to gain thousands. There are also those who continually provoke and challenge the staff, the governor, the visiting committee, the commissioners. These are the men who are admired; their opinion matters and they set the tone. They will deliberately create conflict situations with the staff and the authorities, and the more they are punished the more they become heroes.

In most closed local prisons, this situation must be viewed as going on against a general background of lassitude and moral enervation. Everything a prisoner—or for that matter, a prison officer—does is regulated; and everything he has—food, shelter, cinema shows, educational and leisure activities—is provided for him without his having to make any corresponding effort. The result is that the very many prisoners who are weak and inadequate find themselves in a, for them, disastrous position, where they are not expected to do anything for themselves—indeed they are prevented from ever considering such a course. They have no choice to make, no decision to take, no responsibility to face. No demands are made upon them, except that of conformity to a discipline imposed entirely from outside, and it is not surprising that long-term prisoners sometime develop "gate-fever" through dread of the day when they have to meet a hostile world on their discharge, where they have to fend for themselves, to get their own lodging, to find—and to keep—a job.

It is, incidentally, one of the most marked characteristics of the recidivist that he cannot keep a job. The typical case history will include truanting from school, frequent changes of jobs in his youth, and a really remarkable inability to stick to any work which may have been found for him during his adult years. There is a deep connection between work-shyness and the anti-social character, and it is not really difficult to see where that connection lies.

When one is introduced to some new acquaintance, merely to be told that he is Mr. Brown means very little. It is only when one learns what Mr. Brown *does* that he assumes significance, that he falls into place in a kind of rank order of the imagination which is arranged according to the values which we hold. "He is an actor," or "he is is a Labour M.P." may place him high or low, according to our regard for the theatre or political inclinations. "He is a road sweeper," as opposed to "he is a Professor of Moral Philosophy," will make us expect a certain level of conversation from the latter, even though closer acquaintance may well make us prefer the company of the former. Our work defines our function in society, and whether we like it or not, it gives us a recognised status and an expected social role. It is largely by means of our work that we are able to make our contributions to the ends of society, and if we cannot work, by reason of ill-health or because of unemployment or retirement, it is not only an economic loss that we

suffer. Very often, the worst part of it is the feeling of being useless, of being no longer wanted.

No Longer wanted—that is a sensation which is quite foreign to many recidivist prisoners, for they are people who, time and again, were rejected and unloved children, and they may never have been wanted at all in all their lives—except perhaps by the police. They are people who, as children, were often insecure and afraid to compete with other children in their work at school. So they truanted and ran away. They are people who, as they grow up, have already accepted as inevitable the hopeless feeling of the unemployed who is not needed at the factory or shop, who is outside the magic circle, beyond the pale. They are people who have become convinced that they have no function, no social contribution to make—and so they come to band together against society, they become anti-social.

Persistent inability to work is now being recognised as a serious psychological symptom. Of course, some people are more energetic than others, but real laziness is almost a myth. The child who does not want to work is nevertheless highly active in other ways, the petty scrounger who cannot hold down a job will display great persistence and ingenuity in fabricating some story, and travel many miles to obtain a few shillings under false pretences. Work-shyness is by no means the equivalent of sloth, and it is now the main criterion of selection for admission to the Social Rehabilitation Unit run by Dr. Maxwell Jones at the Belmont Mental Hospital. A high proportion of patients at this unit have criminal records, and there seems little doubt that the lack of work in local prisons, and the low value placed upon it, must aggravate this problem.

If the tempo is slow, the demands made few, the influence of prisoner on prisoner poor, the general atmosphere is sometimes poisoned still further in ordinary local prisons by mutual antagonism and hostility between prisoners and staff. It is easy to see why unwilling captives should resent their captors, but it is also understandable why prison officers often dislike their charges. Prisoners are not invariably likeable characters, and some are highly unstable and dangerously aggressive. Any outburst of violence must be coped with by the officers who, incidentally, often spend longer behind walls than most of the prisoners. They live their lives in close community with some of the most difficult men in the country; and even while they sleep they are seldom more than a stone's throw from the gate. Their job is custodial and disciplinarian, and the need for vigilance and security is impressed upon them by the authorities and general public alike. Their days are spent endlessly locking and unlocking doors, counting and recounting heads, marching prisoners back and forth. They stand locked in the workshops, passive, bored, waiting for minute after monotonous minute to tick away in a roomful of people for all of whom time stretches

endless. Yet they must be alert, must quickly scent tension, must be prepared to meet the attack whose natural target they are.

And there is more to it than that. A few years ago a Parliamentary Select Committee on Estimates [4] was looking into the administration of prisons. A prison officer when asked whether he would like his son to go into the service, replied with a decided "no." And here we come back to the question of work determining status and social role. A doctor or an engineer—they look after our health or our roads and railways, they perform a useful function, they are respected and may be looked up to, they are entitled to feel a pride in their job. But to lock another human being into a cell, to keep him captive against his wish—there is something rather degrading about this, and it is hard to see how being the human instrument by which society imposes punishment can bring any great satisfaction or pride. And as long as our prison system is still punitive, or even mainly custodial, who would wish to be a warder? The fact that we are a thousand officers short in the prison service is, to some extent, a reflection on the nature of the duties which are at present involved.

Thus far I have painted the picture as I see it in local prisons. However, all is not unrelieved gloom. Nearly one-half of our prison population is *not* in local prisons but in training prisons of various kinds, or in open institutions. There the régime is very different. Prisoners can, and are expected to, do a normal day's work, and the work which is available is less monotonous. There are some excellent workshops where carpentry and joinery of a very high order are turned out. There are fitters' shops, good quality printing and book-binding; and above all there is work in the open, on farms, on the roads, in gardens and market gardens, and in forests. Even in maximum security prisons of this kind the atmosphere is not oppressive. Cells are left unlocked all day long, there is a constant chatter as men work at something reasonably constructive, there is often a great variety of evening classes, some of a very high standard, and there are usually a few men who are reading for university degrees. The atmosphere is less tense, more informal, and the governor, strolling through halls and workshops, is often greeted with a cheerful shout or a wave of the hand. Everything is more purposeful, and the staff too, have the feeling that they are, not so much watching that men shall not escape, as training people to become carpenters or bricklayers or dairymen. Above all, since all prisoners at training prisons are selected there are no aggressive psychopaths whose explosive behaviour is a constant source of tension in local prisons.

At open institutions, the general atmosphere is even better and freer. The demands made on the prisoners, both physical and

[4] Seventh Report from the Select Committee on Estimates; Session 1951–1952, Prisons, H.M.S.O.

moral, are considerable, for not only are they expected to work very hard, but they are expected to behave themselves of their own accord and without supervision. There are no locks and no bars; anyone can escape, the responsibility for not running away is on the prisoner himself, he has to make his own choice and face up to temptation. He is trusted, and perhaps for the first time he learns that he *can* be trusted, that he *can* stand up to a moral challenge and win. It is not without significance that the proportion of escapes from open prisons is actually lower than from closed prisons where the only challenge is how to beat the wall, how to outwit the captors, how to laugh at the locksmiths even if it is only for a day or two. A man who escapes from Dartmoor becomes a great hero in the eyes of every prisoner in the country; he has newspaper headlines to himself, he is mentioned in ominous tones by B.B.C. announcers, he may have pride of place over important political developments at home and abroad. But the man who runs away from an open institution becomes a weakling who can't take it. The headmaster of the famous Cotswold Approved School, Mr. C. A. Joyce, has developed a most effective technique for dealing with absconders. When such lads are brought back, they are sometimes put into a room which has extra comforts, they are given food which is really for a younger age group and generally treated as children, for they have behaved like children. Few lads who are fast growing up want to be treated like little boys, they do not want to be thought soft and this approach can be very effective in helping some of them to face up to difficulties.

So here you have the good and the bad of it, and it is perhaps fair to say that our open prisons and Borstals are recognised by informed observers as being better than most similar institutions abroad. I am nevertheless going to suggest to you that the whole field of institutional training and treatment needs re-thinking, and that we are not only faced with the urgent task of trying to remove the many negative influences which play such a large part in the régime of local prisons, but of having to find entirely new and strong positive forces which will help to bring about fundamental changes of attitude in confirmed criminals.

What has really happened in our prison system is that we divide prisoners into two categories: those who are considered trainable, and those who are not. The so-called "trainables" have to fulfil two requirements: they have to be of reasonable good personality, and they have to have sentences which are long enough for them to *be* trained. The effect is that many potential recidivists are missed because they get a sentence of, say, three months or under, or a succession of short sentences. There is quite a stage army of petty offenders, mostly inadequate personalities, who are popped in and out of prison for a week here and a fortnight there; who gradually sink deeper into the mire, until by the time they get a long sentence they are no longer considered trainable. And then there are those

who do receive a fairly long sentence straight away but who are soon recognised as having a character so twisted, a personality so damaged, that they, too, are not considered fit subjects for the more hopeful régime of a training prison. As a result a considerable proportion of offenders, who really form the hard core of our prison population, receive no real training at all; and therefore the question whether or not relapse into crime is really affected to any extent by whatever is done in prisons to-day is somewhat problematical, for it is quite possible that most of the more hopeful cases would settle down to a law-abiding life in any case. Moreover, it is hard to see how anyone with any real personality defect, such as would predispose him to prolonged recidivism, could benefit even from the training in the best institutions. Is becoming a reasonably good carpenter really going to stop a man with abnormal sex instincts from assaulting little girls? Is a man who can never control his temper going to benefit from evening classes in German? Is a pathological liar and self-deceiver going to be helped by even the best course in brick-laying?

Yet these are the very people who offend again and again. They are, or at least they should be, the true reason why we need prisons at all. The real criminals are twisted personalities, and if we take the task of protecting society and of reclaiming such damaged human beings seriously we must get down to much more fundamental things than just giving prisoners reasonably good physical conditions and keeping them busy for as many hours of the day and evening as we can. To expect results from our present treatment methods is a little as if we expected a chronic drunkard to drink no more, a drug addict to stop, or a mental deficient to become intelligent provided he was given the right clothing, the right diet, and the right amount of exercise. And the example is not so far fetched, for there are a good many chronic drunkards, mental deficients and even the occasional drug addict in our prison population.

The Howard League for Penal Reform has put forward some proposals for the reform of local prisons which will go some way toward bringing about the changes we want.[5] They have also been incorporated in a special supplement of the *New Statesman*, and I will merely summarise them briefly.

First, there is a great need to find alternatives for short sentences of imprisonment, if the offender involved does not really need institutional treatment. One out of every two prison sentences is for three months or less, and there are whole categories of prisoners who might well be dealt with otherwise. There are something like 9,000 persons a year who are remanded in custody in a prison, but not subsequently sent to prison, who thus come into contact with prison life, create administrative problems for the staff, and take badly needed work away from those who serve

[5] Howard League for Penal Reform, Annual Report 1955–1956.

actual sentences. There are civil prisoners who could be dealt with outside any gaol and there are many other types which I shall not enumerate now.

Secondly, an effort must be made to cut down the number of really long sentences for people who are not a danger but merely a nuisance. Many experts agree that nothing useful can be done for such people after, say, two years, but they continue to occupy cells quite needlessly.

Thirdly, there is a need for the segregation and treatment of psychopaths in institutions with special medical facilities. Prison governors themselves estimate that there are about 2 per cent. of such abnormal offenders in the prison population; other experts put the number even higher—nearly 5 per cent. The segregation of psychopaths would very considerably reduce the tension in the ordinary prisons. They become almost invariably recidivists and require special and very careful medical and psychiatric treatment. But at the moment, we are still at the stage where the most aggressive amongst these sometimes constitutionally abnormal persons are flogged, just as lunatics used to be punished and beaten not so long ago.

Fourthly, and this point is of special importance, many of our local prisons are not only too old, but also far too large. Today Wandsworth holds 1,300 men, Pentonville and several others a thousand, and many more hold nearly that number. This, together with the rapid change in population owing to short sentences, makes it impossible for the governor ever to get to know his prisoners and their needs; it makes it impossible to get down to their individual problems, or to have anything but an impersonal régime. Moreover, the governor has very little help, so that at Pentonville, for instance you have just the governor and the deputy governor looking after a thousand difficult men. What colonel would command a regiment, what captain a ship, if he had only one other officer to help him? But in treatment, more than in a regiment or a ship, we must be able to get down to personal relations, and if we cannot have new and smaller prisons because of building costs, then we must at least attempt to split the larger prisons into smaller units, each under its own governor, so that he has a chance to be more than a mere administrator, to be someone who can understand and attempt to deal with the human beings whom he has in his charge.

Finally, every effort must be made to make the job of the ordinary prison officer more interesting, more personal, less custodial and more remedial. He is in a unique position to observe and get to know prisoners and their difficulties. Let him do so, let him act upon his knowledge, let him discuss the problems of his prisoners with governor, medical officer, or chaplain, let him grow from a turnkey to a social worker.

An attempt to implement this programme is now being made

at Norwich Prison, and first results are greatly encouraging. But we have to go much further than this. We have found that probation officers in order to do their job properly, need quite a long and careful training, and there are indications that even the present scheme does not dig deeply enough. Yet probation officers deal with cases which are not nearly as complicated as those we find in prison; and it is therefore a paradox, to put it mildly, that governors and assistant governors do not receive at least the equivalent training.

Moreover, we have become aware in the last two decades, that many psychological problems can be dealt with more effectively in a group than by personal interview. Group therapy, at first often used simply as a means of making the most economical use of psychiatric services, is now known to have definite advantages of its own, over and above those possessed by individual treatment. It has led to the development of what is now known as a therapeutic community, and this makes it possible, perhaps for the first time, to devise a régime which really is capable of affecting and altering deeply ingrained attitudes.

Perhaps the easiest way in which I, as a layman, can describe what group therapy is, is by quoting an expert, Dr. Howard Jones,[6] when he describes this process in his textbook on *Crime and the Penal System*. Group therapy, he says, usually takes the form of group discussions, and:

> "the patients might discuss the incidents of their daily lives, and by sharing experience, give each other greater understanding and the ability to cope better in the future. In more clinically orientated groups, they would seek to give each other insight at a much deeper level, discussing significant childhood experiences, and trying to elucidate unconscious motives. . . . If the group is skilfully handled, they will be able to benefit from the healing effect of satisfying personal relationships, and also learn to handle social situations more competently."

In addition to group therapy, psychodrama is sometimes used. In this the patient re-enacts some particularly significant experience, perhaps with the help of other patients.

> "Here," says Dr. Jones, "instead of aiming at a verbal understanding of a situation, he obtains the 'feel' of the actual experience. Thus, in spite of the acting involved, it can be a more real experience than discussion therapy, but it does not lead to the clear insight of the latter."

Summing up the value of group therapy he puts the matter as follows:

> "The most obvious gain from group therapy is insight, secured through the interplay of ideas, and personalities, but there are others. Insight itself depends upon the identification

[6] Jones (Howard), *Crime and the Penal System*, Univ. Tutorial Press, 1956, p. 222.

> of the individual with the therapy group, and this has further consequences. It causes the group members to identify with . . . norms (which are) directed towards recovery, *i.e.*, towards co-operating in treatment and trying to get better."

Other advantages are the fact that patients—or offenders—come to be accepted by the group, not for what they pretend to be—tough gangsters, successful cracksmen, surrounded by expensively dressed and fabulously beautiful women, and by admiring body-guards—but for what they really are: hurt, afraid, unsuccessful, rejected, poor, sometimes illiterate and often of low mental calibre. Even thus naked, they find understanding and acceptance, not only in the group itself but with the discussion leader. Here we come to the crux of the situation, for I believe it would be possible to train governors and assistant governors in group dynamics, to train them to become discussion leaders, to train them to acquire insight into themselves, into the difficulties of prisoners, and into the tensions of their own staff.

Already group methods are used in prison, but so far only by doctors. However, it does not require some superhuman or magical skill for either assistant governors, or at least prison social workers, to learn to lead discussions. It only needs training and the right kind of personality, and I am sure that those who, like Dr. Jones, or for that matter Dr. Roper, himself an experienced prison medical officer, call for an extension of group therapy *for the treatment of delinquency itself*, are working along the right lines.

It is along these general lines that I see the future development of penal methods, and if we follow the teaching of modern penology and of the behaviour sciences, these methods should gradually become not only more rational, but also much more successful in protecting society and rehabilitating the individual offender.

The purposes of criminal punishment are all intended for the protection and benefit of the community. It is easy to turn away from what happens to those convicted of crime. I suspect that by and large the public get the penal system which their interest in the subject deserves.

Gerald Gardiner.*

(Concluded)

* Q.C., one of the Benchers of the Inner Temple.

LEGAL IMPLICATIONS OF ARTIFICIAL INSEMINATION

THE recent Scottish case of *Maclennan* v. *Maclennan* [1] involving the relationship between artificial insemination and adultery raises once again the whole problem of artificial insemination and its legal implications. Although in recent years the literature on this subject has grown enormously in extent, it remains inconclusive,[2] and the problem is still one of intense controversy. It is therefore submitted that it is worthwhile giving further consideration to the problems raised by this practice.

It must be emphasised at the outset that we are here primarily concerned with the legal aspects of the problem. Into the many complex medical, ethical, sociological and even theological problems which are associated with the practice we do not propose to enter,[2a] for it is submitted that to lay undue stress on these aspects of the problem, very real as they are, does not assist a dispassionate assessment of the legal position. As Koerner has remarked,[3] regarding the view expressed by a Bordeaux court [4] to the effect that the practice was contrary to natural law, "This serves to clothe subjectivism with a Grotian authority but it adds very little to a proper understanding of the problem."

Further, as was emphasised by the Commission appointed by the Archbishop of Canterbury to inquire into the problem,[5] too little data is available for any discussion of most of these issues to be anything more than highly speculative. It is doubtless true, as Willink has remarked,[6] that "to write on legal aspects alone, is to neglect equally weighty considerations—genetic, sociological and moral." However, the fact remains that any discussion of the legal position can itself only be tentative, and the problem would only be further obscured by the introduction of additional speculative material.

The fact is that there is nothing in the statute or common law

[1] 1958 S.L.T. 12 (held, artificial insemination by donor does not constitute adultery). See also the *Scotsman*, January 11, 1958. The English newspapers reported the case more briefly, *e.g.*, *The Times* of the same date.

[2] A comprehensive bibliography containing legal, medical and theological contributions to the subject is contained in Glover, *Artificial Insemination in Human Beings* (1948).

[2a] The writer has traced the history of the practice in "The Development and Use of Artificial Insemination" (1958) 49 Eugenics Rev. 187.

[3] "Medico-legal Considerations in Artificial Insemination" (1948) 8 La.L.R. 484, at p. 489.

[4] *Vide infra*, p. 237.

[5] The report of the Commission, *Artificial Human Insemination*, was published in 1948 and reprinted in 1952.

[6] "Artificial Insemination: Legal Aspects" (1947) 158 *Practitioner* 349.

of this country which renders artificial insemination *per se* illegal, either as regards the parties or their medical advisers. Whatever, therefore, may be the objections to the practice, or to certain forms of the practice, it is at the moment lawful, and it is the legal consequences which arise from the present situation which are our primary concern.

It should perhaps be emphasised that a consideration of the legal implications of artificial insemination cannot be regarded as a matter of merely academic interest. As Elles has put it,[7] "Even if the practice of artificial insemination were stopped tomorrow serious problems would arise because of what has already been done."

Indeed a consideration of these problems is becoming a matter of some urgency, for, in the words of a leading article in the *British Medical Journal*,[8]

> "These legal problems and many others which have been suggested from time to time show the need to govern a practice which, whatever the objections to it, seems bound to become socially important. The medical practitioner desires to help his patients in every possible way, and evidence is not lacking that in a number of cases he can give substantial help by artificial insemination. It is neither just nor desirable that he should do so at such a risk as the recent discussions have disclosed. He has a right to statutory guidance and protection."

In discussing these problems it is perhaps worthwhile to commence by considering the few reported cases in which they have come before the courts. The earliest reported decision would appear to be that of the court at Bordeaux in 1887.[9] The point at issue concerned an action by a doctor for fees for having performed an artificial insemination which was apparently unsuccessful. It was held that the action could not be maintained on the ground that it involved a breach of "le secret médical," but despite this the court had the following to say regarding the question of artificial insemination:

> "Mais que, sans avoir à rechercher quelle est, au point de vue scientifique, le valeur du procédé employé par L . . . le tribunal ne peut avoir dans l'emploi de cet procédé une cause licite d'obligation; qu'il ne consiste plus, en effet, à supprimer, soit chez la femme, soit chez l'homme, les causes de sterilité, de manière à les rendre aptes à la génération, mais

[7] "Legal and Social Implications of Artificial Insemination" (1949) 34 Iowa L.R. 658.

[8] Issue of May 3, 1949.

[9] The only report of this decision that I have been able to trace is "*Note sur la fécondation artificielle à propos d'un jugement du tribunal de Bordeaux*" (1883) 20 Ann. de Gynec. 401, which contains the extracts from the judgment which are quoted above and the comments thereon by a committee appointed by the Société de médecine légale.

> à faire concurrir à l'acte même de la génération, et pour son accomplissement direct dans ce qu'il y a de plus intime, un intermédiaire entre le mari et la femme, usant de moyens artificiels que réprouve la loi naturelle, et qui pourrait même au cas d'abus, créer un véritable danger social."

They concluded,

> "Qu'il importe à la dignité du mariage que de semblables procédés ne soient pas transportés du domaine de la science dans celui de la pratique, et que la justice ne sanctionne pas des obligations fondées sur leur emploi."

Commenting on this decision, a committee appointed by the Société de Médecine Légale in 1883 reported that although they supported the decision in so far as it was based upon the breach of the "secret médical," they opposed the opinion expressed by the court regarding the practice of artificial insemination. Thus they stated,

> "Loin de condamner la fécondation artificielle, comme le tribunal de Bordeaux semble le désirer, nous sommes disposés à l'encourager, car elle tend à perpétuer l'espèce et fournit à la famille de joies qu'elle n'aurait pu goûter sans elle."

They added however,

> "Toutefois, nous sommes d'avis que l'opération ne doit être tentée que sur la demande expresse des intéressés et après que l'on s'est assuré de la qualité du sperme fourni par le mari."

The problem came before the German courts early in this century, or rather a similar problem appears to have come before them, for although we have been unable to examine the reports of this case, it would appear that the point at issue was the legitimacy of a child who was conceived as a result of self-insemination undertaken by a woman with semen derived from her husband.[10] This case, which arose in Düsseldorf, went through several German courts, the *Landgericht zu Koblenz* in 1905, the *Oberlandgericht zu Köln* in 1907, and *Der oberste deutsche Gerichtshof das Reichsgericht zu Leipzig* in 1908. The decision would appear to have been that the child was legitimate on the ground that "cohabitation" was not a *sine qua non* for legitimacy.

The first occasion upon which the problems were considered by a court in a common law jurisdiction would appear to be in *Orford* v. *Orford*[11] which came before the Ontario courts in 1921. The plaintiff was seeking alimony, and the husband, by way of defence, alleged that his wife had been guilty of adultery in that

[10] This decision is apparently referred to by Rohleder, but neither Koerner nor Glover, who both refer to this source, provide any further references. Glover's account, upon which we have relied, differs from that given by Koerner. The latter refers to two German decisions in 1905 and 1908 respectively. We have assumed that the 1908 decision mentioned by Koerner is in fact the appeal from the 1905 decision.

[11] (1921) 49 Ontario L.R. 15.

she had undergone artificial insemination (A.I.D.)[12] without his consent. Orde J. refused to believe the plaintiff's story, and found as a fact that sexual intercourse had taken place with the "donor" in the normal way. Despite this, however, his Lordship dealt with the issue of artificial insemination, and held that, even if her story had been accepted, she would have been guilty of adultery.

His Lordship examined the meaning of the term adultery and admitted that most definitions laid stress upon the necessity for *vera copula*, but he emphasised that, nevertheless, the term had never had an exact meaning. Indeed he argued that the stress laid on the necessity for *vera copula*[13]

> "merely shows the fallacy of relying upon the precise terms of a definition without regard to the circumstances which gave rise to it, or the branch of law in which the offence of adultery forms an element."

Regarding the nature of adultery his Lordship stated[14]

> "In my judgment the essence of the offence of adultery consists not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of those powers to the service or enjoyment of any person other than the husband or wife comes within the definition of adultery."

Finally he stressed that, in his opinion, the emphasis upon *vera copula* in most definitions of adultery was simply to exclude anything that fell short of this, and added that this strengthened the view that he was taking, on the ground that,[15]

> "So long as nothing takes place which can by any possibility affect that function (*i.e.*, the reproductive function) there can be no adultery; so that unless and until there is actual sexual intercourse there can be no adultery. But to argue from that that adultery necessarily begins and ends there is utterly fallacious. Sexual intercourse is adulterous because in the case of the woman, it involves the possibility of introducing into the family of the husband a false strain of blood. Any act on the part of the wife which does that would therefore be adulterous."

The next cases to be considered are those in which the American courts have dealt with these problems. The first such case would appear to be that of *Hoch* v. *Hoch*[16] which is unfortunately unreported. It was however apparently stated that no definition of adultery could be held to include artificial insemination. As

[12] Artificial insemination takes two main forms: A.I.H. in which the semen used is obtained from the husband, and A.I.D. in which the semen used is obtained from a third party or donor.
[13] At p. 21.
[14] At p. 22.
[15] At p. 23.
[16] (1945) *Chicago Sun*, February 10.

in *Orford* v. *Orford*, however, it would appear that a decree of divorce was granted on the ground that adultery had taken place in the normal way.

The next American case is that of *Strnad* v. *Strnad*.[17] The facts of this case reveal a very unhappy state of affairs. The wife had filed a separation suit and was awarded the custody of the child, the father having certain rights of visitation. He subsequently "abducted" the child and took her to Czechoslovakia, where she was found by the mother and brought to New York. The mother then reopened the separation suit and claimed, in an effort to defeat the father's rights, that the child had been conceived as a result of A.I.D. and was therefore illegitimate. Greenberg J. was careful to emphasise that he was only concerned with the issue as to whether the father was a fit and proper person to have visitation rights. However, in holding that he was, and assuming as a fact that the husband had consented to the insemination of the wife, he had the following to say regarding the problem of artificial insemination [18]:

> "The court holds that the child has been potentially adopted or semi-adopted by the defendant. In any event in so far as this defendant is concerned, and with particular reference to visitation, he is entitled to the same rights as those acquired by a foster parent who has formally adopted a child, if not the same rights as those to which a natural parent under the circumstances would be entitled. . . . In the opinion of this court . . . this child is not an illegitimate child. Indeed logically and realistically the situation is no different from that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties. . . . The court does not pass on the legal consequences in so far as property rights are concerned . . . nor does the court express an opinion on the propriety of procreation by the medium of artificial insemination."

Before leaving this decision it should be mentioned that, as reported by Hoyt,[19] the subsequent history of the case reveals yet further unhappy confusion. The mother, after the decision referred to above, went to Oklahoma, thus rendering visitation by her husband impossible, and there obtained a divorce which excluded visitation by the husband.

The last American case to be discussed is that of *Doornbos* v. *Doornbos* [20] in which the problem of the relationship between artificial insemination and adultery was once again raised. The

[17] (1948) 78 N.Y.S. 2d. 390.

[18] The above quotation from the judgment is taken from the account of the case which appeared in (1948) 147 J.A.M.A. 251. The details are taken from Glover's account of the case.

[19] "Artificial Insemination: Legal Status of Child born thereby" (1950) Wis. L.R. 136.

[20] No. 54 S. 14981 (Superior Ct. Cook Co., December 13, 1954).

decision does not appear to have been reported, but it would seem that the court decreed that,[21]

> "(1) Heterologous Artificial Insemination (when the specimen of semen used is obtained from a third party or donor) with or without the consent of the husband is contrary to public policy and good morals and constitutes adultery on the part of the mother. A child so conceived is not a child born in wedlock and is therefore illegitimate. As such it is the child of the mother and the father has no right or interest in said child.
>
> "(2) Homologous Artificial Insemination (when the specimen of semen used is obtained from the husband of the woman) is not contrary to public policy and good morals and does not present any difficulty from the legal point of view."

Finally brief mention must be made of the only two cases in which these problems have arisen before the English courts. In *R. E. L.* v. *E. L.*[22] the marriage in question had not been consummated in the normal way, despite persistent attempts, because of the husband's inability. In an endeavour to save the marriage the wife submitted to A.I.H. but shortly after left her husband and petitioned for nullity, only subsequently to discover that the insemination had been successful. In granting a decree Pearce J. seemed to assume that there could be no question of the insemination amounting to consummation, and the only point taken was whether the wife must be deemed to have approbated the marriage. The same point was raised in *Slater* v. *Slater*,[23] the only other English case in which the problems of insemination have come before the courts. In this case the insemination (A.I.D.) was unsuccessful and resort was made to adoption, but nevertheless it was assumed that the attempted insemination could not constitute consummation, and it was held that despite the insemination, and the adoption, the doctrine of approbation could not be regarded as applicable so as to defeat the wife's petition for a decree which was thus duly granted.

We can now consider, in the light of these authorities, the various points of legal interest raised by the practice of artificial insemination, and we may first consider the problem of the relationship between consummation and insemination, as raised in *R. E. L.* v. *E. L.* and *Slater* v. *Slater*. This problem is not one which has been extensively considered in the literature, and the decisions referred to above appear to be the only authorities. Manifestly the first point that must be considered in this connection is the question as to what constitutes consummation within the meaning of that term in English law.

21 The above quotation from the judgment is taken from Tallin, "Artificial Insemination" (1956) 34 Can.B.R. 1, at p. 15.
22 [1949] P. 211.
23 [1953] P. 352.

The inevitable starting point for any discussion of this problem is the decision of Dr. Lushington in *D.* v. *A.*[24] which is still taken as laying down some of the fundamental principles underlying the English concept of consummation. In this case the action was brought for non-consummation owing to the alleged incapacity of the wife. It was established that she possessed no uterus at all, and only a very small vagina. In granting the decree Dr. Lushington drew a clear distinction between consummation and the ability to conceive. He thus stated,[25]

> "Mere incapacity, however, of conception, is not a sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient that it would be a waste of time to discuss an admitted point. The only question is whether the lady is or is not capable of sexual intercourse, or if at present incapable, whether that incapacity can be removed."

Further, with regard to the question as to what constitutes sexual intercourse for this purpose his Lordship stated,[26]

> "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet I cannot go to the length of saying every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural I should not hesitate to say that, legally speaking, it is no intercourse at all."

This decision would appear to have established two points. First, that "natural" or "ordinary and complete" intercourse is a necessary condition for consummation. Second, that consummation is in no way related to the ability to conceive. The main problem raised by this decision is the interpretation of the phrase "ordinary and complete" intercourse, a problem which has been discussed mainly in connection with two types of cases; those involving the use of artificial contraceptives, and those in which the practice of *coitus interruptus* has been used, and it is in the decisions dealing with these points that the definition of consummation in English law is rendered more precise and exact.

There is little that needs to be said directly regarding the problem as it arises in connection with the use of artificial contraceptives, as the House of Lords, in *Baxter* v. *Baxter*,[27] overruling the Court of Appeal in *Cowen* v. *Cowen*,[28] held that the use of a sheath as an artificial contraceptive did not prevent consummation of the marriage, *i.e.*, the use of a sheath did not prevent intercourse from being "ordinary and complete." The main significance of

[24] (1845) 1 Rob.Ecc. 279.
[25] At p. 296.
[26] At p. 298.
[27] [1948] A.C. 274.
[28] [1946] P. 36.

this decision, in the present context, is not the specific point which was decided, but rather the effect which it has had upon the concept of consummation in English law generally. This can perhaps best be seen by considering the conflict of view which appeared between the High Court and the Court of Appeal in *Cowen* v. *Cowen*.

In the High Court Pilcher J. expressed his view as follows,[29]

> " the party who wishes to establish that the marriage has been consummated has, as far as I know, always had to show that there has been some penetration, some effective penetration of the female by the male organ. Once he has established that there has been complete penetration he has made out his case."

In the Court of Appeal, however, du Parcq L.J. stated,[30]

> " We are of the opinion that sexual intercourse cannot be said to be complete when the husband deliberately discontinues the act of intercourse before it has reached its natural termination, or when he artificially prevents that natural termination which is the passage of the male seed into the body of the woman."

It will be observed that, in so far as both courts accepted the authority of *D.* v. *A.*, the difference between them is one relating to the interpretation of " ordinary and complete " intercourse, Pilcher J. accepting penetration as sufficient to constitute such intercourse, du Parcq L.J. requiring emission in the body of the woman.

In *Baxter* v. *Baxter* the House of Lords did not, in express terms, decide between these two tests. The Lord Chancellor was content to rely upon the actual wording of the decision in *D.* v. *A.* and to emphasise the difficulties which would inevitably arise if artificial contraception were held to prevent consummation of a marriage.[31] By implication, however, his Lordship was rejecting the test of consummation adopted by the Court of Appeal in *Cowen* v. *Cowen*, for it cannot be said that " passage of the male

[29] Quoted in the judgment of the Court of Appeal at p. 39. See also *L.* v. *L.* (1922) 38 T.L.R. 697.

[30] At p. 40. See also *Firth* v. *Firth* (1941) unreported, but quoted in *Baxter* v. *Baxter*, *supra*, and *J.* v. *J.* [1947] P. 158.

[31] In the course of his speech the Lord Chancellor also seemed to imply that the word consummation, as used in the Matrimonial Causes Act, 1937, in relation to wilful refusal, had a different meaning from that which it possessed in relation to incapacity. Thus, at p. 285 he stated: " It is clear . . . that in relation to the meaning of the word ' consummate ' the common area covered by suits for nullity on the grounds respectively of incapacity and wilful refusal to consummate, is very small." Again at p. 290 he stated: " I take the view that in this legislation Parliament used the word ' consummate ' as that word is understood in common parlance and in the light of social conditions known to exist." It is respectfully submitted that this is not so. Parliament must be assumed to know the law and to legislate in the light of that knowledge. See *Grimes* v. *Grimes* [1948] P. 323, *per* Finnemore J. at p. 326.

seed into the body of the woman" occurs in condomistic intercourse. If this is so then the question that arises is whether the decision in *Baxter* v. *Baxter* must be taken as having approved the penetration test as adopted by Pilcher J. in *Cowen* v. *Cowen*. On this point there would appear to be a conflict of authorities.

It was the opinion of Finnemore J. in *Grimes* v. *Grimes*[32] that *Baxter* v. *Baxter* could not be so interpreted. In this case the issue arose as to whether *coitus interruptus* constituted consummation. This point was expressly left open by the Lord Chancellor in *Baxter* v. *Baxter* when he stated,[33]

> "I wish to make an observation on one practice referred to in this summary of the facts, namely, the practice of withdrawal before emission, or *coitus interruptus*. This practice as distinct from artificial methods of contraception does not arise in the case before the House and I prefer to express no opinion about it,"

although the opinion of du Parcq L.J. in *Cowen* v. *Cowen*, quoted above, suggested that the practice would not constitute consummation. In *Grimes* v. *Grimes* Finnemore J. agreed with du Parcq L.J. Regarding *Baxter* v. *Baxter* his Lordship stated,[34]

> "What *Baxter* v. *Baxter* says, as I understand it, is that where you have all the elements of sexual intercourse, including emission, and consequent satisfaction, the fact that there has been introduced an artificial preventive in order to stay the possible procreation of children does not prevent consummation of the marriage."

Further, with regard to the point before him, his Lordship stated,[35]

> "The point before me is whether *coitus interruptus* is natural and complete intercourse. All the authorities which have been cited to me, going back a long time, plainly suggest that it is not natural and complete intercourse because there must be emission within the body of the other spouse such as does not occur in *coitus interruptus*. It is difficult to see how a *coitus* which is *interruptus* can be said to be complete."

In this his Lordship would appear to be attempting to modify the test as laid down in *Cowen* v. *Cowen*, such as to render it more compatible with *Baxter* v. *Baxter*. He thus appears to be suggesting that the test of consummation is "emission within the body of the other spouse" and further that the decision in *Baxter* v. *Baxter* is merely to be interpreted as meaning that the mere fact that such emission does not lead to a "passage of male seed into the body of the woman" does not prevent consummation.

This view, however, is opposed by two more recent decisions, both concerned with *coitus interruptus*, namely, *White* v. *White*[36]

[32] [1948] P. 323.
[33] At p. 283.
[34] At p. 328.
[35] At p. 328.
[36] [1948] P. 330.

and *Cackett* v. *Cackett*.[37] In the former Willmer J. held that, despite the express reservation of the point in *Baxter* v. *Baxter*,[38]

> "the House of Lords have, inferentially at any rate, decided the question of principle which must, in my judgment, lie at the root of the question."

Regarding the interpretation of the decision in *Baxter* v. *Baxter* his Lordship stated,[39]

> "Reverting to *Baxter* v. *Baxter* it seems to me that if one looks at the principle underlying the decision of the House of Lords, they were drawing the same distinction as had been drawn in the earlier cases cited, between conception on the one hand and mere conjunction of bodies on the other. The question is therefore what is meant by this 'conjunction of bodies' or, to use the Latin phrase, *vera copula*. There is no question in this case but that full entry and penetration has been achieved. It is submitted on behalf of the wife that there is no *vera copula* unless there is not only full entry and penetration, but also completion of the act within the woman, whether with or without the use of mechanical contraceptives. On the other hand, it is contended that there is complete conjunction of bodies, a *vera copula*—which means literally true conjunction—as soon as full entry and penetration has been achieved. What follows goes merely to the likelihood or otherwise of conception. In my judgment the latter conclusion must be correct; it seemed to me to follow from the reasoning of the House of Lords in *Baxter* v. *Baxter*."

This view of the matter was also taken by Hodson J. in *Cackett* v. *Cackett*, in which his Lordship also enlarged upon the difficulties which would result from any other view.[40]

> "In my opinion the court would be driven into an impossible situation if it tried further to define what amounted to normal sexual intercourse between normally formed people, for where the woman alleged that the man had failed to complete the sexual act the court would have to inquire at exactly what stage emission took place and what degree of satisfaction was reached by the woman."

In view of this conflict of authorities it is not possible to state with any confidence just what does constitute the concept of

[37] [1950] P. 253.
[38] At p. 334.
[39] At p. 338.
[40] At p. 258. In both these cases a further argument in justification of the decision was adduced in the course of the judgments, namely, that according to the medical evidence the possibility of conception remained despite the use of *coitus interruptus*. Thus, in *Cackett* v. *Cackett*, Hodson J. stated: "Here seed was emitted from the man in close proximity to the woman and the woman might have conceived." Basing himself on this possibility Willmer J., in *White* v. *White* argued that to grant a decree of nullity in such cases might lead to the "curious situation" of a marriage being annulled for non-consummation despite the birth of children, a situation which, if curious, was faced by the court with equanimity in *Clarke* v. *Clarke* [1943] 2 All E.R. 540 and *Snowman* v. *Snowman* [1934] P. 186.

consummation in English law, or indeed whether *coitus interruptus* does in fact amount to consummation or not. It is, however, respectfully submitted that penetration should be regarded as the necessary and sufficient condition for consummation of marriage. This, it is submitted, is supported by the following considerations. First, the passage of male seed into the body of the woman cannot be taken as an acceptable test, for quite apart from the fact that this test was rejected, by implication, in *Baxter* v. *Baxter* it is inconsistent with decisions such as *Clarke* v. *Clarke*[41] and *Snowman* v. *Snowman*[42] in which marriages were annulled on the ground of non-consummation despite the fact that fecundation *ab extra* had taken place, cases in which, therefore, there must have been "passage of male seed." Second, the distinction between emission within the body of the woman and passage of male seed, as would appear to have been drawn by Finnemore J. in *Grimes* v. *Grimes* is one which, it is respectfully submitted, cannot be sustained simply on the grounds set out by Hodson J. in *Cackett* v. *Cackett*.

If this view be correct and if the necessary and sufficient condition for consummation in English law is mere penetration, it would seem to follow that the test laid down in *D.* v. *A.*—that of "ordinary and complete intercourse"—must be read in a rather special sense, since for the purpose of nullity it would appear that intercourse must be considered to be "ordinary and complete" provided only that penetration has occurred. If this be so we can now consider the relation between artificial insemination and consummation.

The first point is that it is quite clear that the act of insemination cannot be considered to constitute consummation. That concept in English matrimonial law clearly demands the existence of a physical relationship between the parties, and this requirement is not met by the act of artificial insemination. It is irrelevant, for this purpose, that the semen used for the insemination is that of the husband. This was made clear by implication at any rate, in *R. E. L.* v. *E. L.* and *Slater* v. *Slater*, a view which is further supported by the principle underlying the decisions in *Clarke* v. *Clarke* and *Snowman* v. *Snowman*.

It should perhaps be emphasised, however, that the mere fact that the parties have resorted to artificial insemination does not of itself exclude the possibility that the marriage has been consummated by that degree of intercourse of which the parties are capable. Indeed it would appear to be medical practice to encourage the parties to continue intercourse, if they are so capable, whilst undergoing insemination.

A further point is that although the act of insemination itself

[41] [1943] 2 All E.R. 540.
[42] [1934] P. 186.

cannot constitute consummation this does not necessarily exclude the possibility that the method used in obtaining the semen amounts to consummation. It is clear, where the semen used is obtained as a result of condomistic intercourse, that the marriage will in fact be consummated by the intercourse. The position where the semen is obtained by means of *coitus interruptus* is, as was indicated above, uncertain, but the more plausible view, it is submitted, is that such a method of obtaining the semen would also amount to consummation. In no other case, however, does there appear to be any possibility that the method used for obtaining semen could amount to consummation of the marriage.

Unfortunately this does not quite dispose of the issue with regard to consummation, for there remains the problem of whether, in those cases in which the marriage has not been consummated, a decree of nullity should be granted on that ground after there has been resort to artificial insemination, particularly in those cases in which the insemination has been successful. This brings us to the doctrine of " sincerity " or approbation of marriage which was, in point of fact, the main issue taken in both the English cases in which this problem has arisen, namely, *R. E. L.* v. *E. L.* and *Slater* v. *Slater.*

The starting point of any discussion of " sincerity " in this context is the decision in *G.* v. *M.*[43] which Langton J., in *Nash* v. *Nash*,[44] described as, " not only the *locus classicus* of the doctrine to be applied but also the alpha and omega of the doctrine itself." In *G.* v. *M.* Lord Selborne C. stated,[45]

> " My own belief is that, to whatever criticisms the phraseology of learned judges in those cases may be open . . . I think I can perceive that the real basis of the reasoning which underlies that phraseology is this, that there may be conduct on the part of the person seeking the remedy which ought to estop that person from having it."

In the same case Lord Watson stated,[46]

> " I think that when those cases are dissected they do show the existence of this rule in the law of England, that in a suit for the nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he or she should be permitted to go on and challenge it with effect."

It should be noted, however, that there would appear to be some doubt as to the extent of the application of this doctrine. In *Nash* v. *Nash* Langton J. suggested that its application was limited

[43] (1885) 10 App.Cas. 171.
[44] [1940] P. 60, at p. 61.
[45] At p. 186.
[46] At p. 197.

to those cases in which the issue turned upon delay in seeking relief. He stated,[47]

> "It will be remembered that in nearly every case in which this plea has been judicially considered delay in putting it forward has been the basis upon which its sincerity has been attacked. The limitation upon the ordinary meaning of the word 'sincerity' to which I have alluded above seems, therefore, to be fairly clearly defined."

It is respectfully submitted that although cases in which delay is alleged as the basis of lack of sincerity are undoubtedly the commonest, this cannot be taken as necessitating a limitation of the doctrine to that type of case. The doctrine has been applied to cases in which the marriage has been relied upon by the complaining spouse in earlier judicial proceedings,[48] and cases involving the so-called "old-age" marriages,[49] and on the basis of these decisions it is submitted that the limitation suggested by Langton J. in *Nash* v. *Nash* cannot be sustained, and that the doctrine is applicable to all and any types of conduct which can be interpreted as implying approbation of the marriage.

The main difficulty which arises in connection with this doctrine, however, is that of defining just what types of conduct can be held to amount to approbation. These difficulties were emphasised by Dr. Lushington in an anonymous case in which he is reported as having said,[50]

> "I have great difficulty in saying what would constitute insincerity and what sincerity. . . . I cannot attempt to define it; it must be a combination of circumstances which show that the alleged ground was not the motive which led to the commencement of the suit, but what would constitute such a case cannot be defined beforehand."

Bearing in mind these factors we must now consider the problem as it arises in connection with marriages in which there has been a resort to artificial insemination. In *R. E. L.* v. *E. L.* it was held

[47] At p. 69.

[48] See *Wilkins* v. *Wilkins* [1896] P. 108 and *Woodland* v. *Woodland* [1928] P. 169, *cf.*, however, *Andrews* v. *Ross* (1884) 14 P.D. 15 and *Miles* v. *Chilton* (1894) 1 Rob.Ecc. 684. See also *Tindall* v. *Tindall* [1953] P. 63.

[49] *Briggs* v. *Morgan* (1820) 2 Hag.Con. 324 in which admittedly Sir William Scott stated, with regard to the age of the parties: "This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months which is not easily accounted for" (at p. 330). For recent discussions relating to the application of this doctrine see *Nash* v. *Nash*, *supra*, *Clifford* v. *Clifford* [1948] 1 All E.R. 398 and *Tindall* v. *Tindall*, *supra*.

[50] (1857) Deane 295. It may be observed that Dr. Lushington is here putting the doctrine on a rather different basis from that which is suggested in *G.* v. *M.*, *supra*, for cases in which the alleged grievance is not the real motive for the bringing of the suit are not necessarily the same as those in which the petitioner has by conduct in some one relied upon or affirmed the existence of the marriage. Although Dr. Lushington in *B.* v. *B.* had earlier expressed the same point of view (1854) 1 Sp.Ecc. & Ad. 248, it is submitted that it is only in the sense in which the doctrine was expressed in *G.* v. *M.* that the doctrine can be considered today.

that, under the circumstances of the case, the conduct of the wife could not amount to approbation of the marriage. On this point Pearce J. stated,[51]

> "So far as approbation of the marriage is concerned, it must be a question of degree, what acts done, with what intention, constitute approbation. Her letters and her evidence show that she never intended to approbate an abnormal marriage. Until the end she made it clear that she desired and intended to have a normal marriage. I do not regard the conception of the child, serious as it is, when done with the expressed dominant intention of producing normality in their sex relations, to be approbation of an abnormal marriage."

This decision was considered by the Court of Appeal in *W.* v. *W.*,[52] which case involved the question whether adoption of a child could be held to amount to approbation of the marriage. In holding that such a proceeding did amount to approbation Evershed M.R. pointed out that,[53]

> "A proceeding to adopt a child under the Adoption of Children Act, 1926, which was then in force, involved certain propositions and consequences. It involved that when two persons jointly adopted a child they must proceed on the footing that they were spouses. . . . The application was made on the footing that the applicants were parties to a valid marriage."

Regarding the view expressed by Pearce J. in *R. E. L.* v. *E. L.* his Lordship stated,[54]

> "Nevertheless I am not, for myself, satisfied of the correctness of the formula which I have read from the judgment of Pearce J. It is not, in my judgment, a question of 'intending to approbate an abnormal marriage' if by that language is meant that the question is whether—whatever may have been the conduct, the 'overt acts' on the part of the complaining spouse—he or she intended (subjectively) to affirm or acquiesce in an abnormal marriage. The question, in my view, in this case, as in all such cases, is: Has the husband or wife (as the case may be) by conduct or overt acts consistent only with such affirmation approbated the existence and validity of the particular marriage, whatever may have been its particular attributes?"

His Lordship continued:

> "I must not be taken as saying that, on its particular facts, *L.* v. *L.* was not correctly decided. It is not necessary for me to express any opinion on that matter. Nor is it necessary for me to express any view on the question whether acquiescence in artificial insemination of a wife from the seed

51 [1949] P. at p. 218
52 [1952] P. 152.
53 At p. 158.
54 At p. 161.

> of a husband, without more, necessarily amounts to such an approbation by either spouse of the marriage as to constitute a bar to later proceedings by him or her for nullity on the ground of the other's incapacity or wilful refusal, or on the further question whether, if the answer to the preceding question be in the affirmative, the complaining spouse can, nevertheless, by the clear expression to the other of the necessary reservation on his or her part, protect himself or herself from the consequences which otherwise would flow from the act of artificial insemination making it, as it were, an act on his or her part 'without prejudice' to his or her other rights."

Reference must finally be made to the decision in *Slater* v. *Slater* in which a child had been adopted after an unsuccessful attempt at artificial insemination. In holding that the facts of the case did not disclose approbation of the marriage Singleton L.J., admitting that it was necessary to examine all the circumstances of the case, argued that neither the insemination nor the adoption could be held to constitute approbation on the ground that both these events occurred before the wife was aware that she had any remedy. It was on this ground also that his Lordship distinguished *W.* v. *W.*

It would appear, therefore, in view of this conflict of authorities that it is not possible to state categorically whether the act of artificial insemination does or does not amount to approbation of the marriage. It is, however, submitted that this issue is one of considerable significance from the point of view of artificial insemination, for if marriages in which the wife has been inseminated are still liable to be annulled on the ground of non-consummation, then in many cases the whole purpose and object of the insemination is largely defeated. It will be submitted that this is a matter regarding which legislation may be regarded as desirable, but in the absence of such provision it is submitted that the authorities justify the view that, under certain circumstances, insemination, or the consequences thereof, may justify the application of the doctrine. It is submitted that both *R. E. L.* v. *E. L.* and *Slater* v. *Slater* must be regarded as being decided on their particular facts, and neither, it is submitted, can be regarded as laying down a general rule that under no circumstances could resort to artificial insemination constitute approbation of a marriage such as to bar subsequent nullity proceedings. The question, in each case, must be determined in relation to the facts thereof within the limits of the doctrine.

Before leaving this point there is one further matter which should be emphasised. Thus far our discussion of consummation has been confined to the problem as it arises in the case of A.I.H. The problem as it arises in connection with A.I.D. remains. It is, of course, quite clear that A.I.D. cannot, of itself, constitute

consummation, any more than A.I.H. can, but in this case there is no possibility of consummation resulting from the methods used in obtaining the semen. On the other hand it should be emphasised that resort to A.I.D. does not necessarily imply that the parties are incapable of consummating the marriage by that degree of intercourse of which they are capable. Equally it should not be assumed that the doctrine of approbation is necessarily confined to A.I.H., for there would appear to be no reason in principle why, if the facts of the case so justify it, the doctrine should not operate to bar a suit for nullity by a party to a marriage in which there had been resort to A.I.D.

We must now turn to consider the relation between artificial insemination and adultery. The literature on this point—which is extensive—reveals the sharpest possible conflict of opinion, the discussion being entirely confined to the case of A.I.D. Indeed the only point upon which all writers seem to be agreed is that A.I.H. does not give rise to any considerable legal problems. Although in voicing this opinion they are clearly overlooking the problem of consummation, the fact remains that we can largely ignore A.I.H. in a discussion of adultery.

As far as the authorities are concerned there are only the few conflicting judicial dicta to which reference has already been made, and Lord Wheatley's recent decision in *Maclennan* v. *Maclennan*,[54a] whilst the Commission appointed by the Archbishop failed to agree on this point. The majority accepted the view of the legal members of the Commission that, "We entertain no doubt at all that the act both of a married donor and a married recipient constitutes adultery," and in support of this opinion they quoted the well-known dictum of Lord Dunedin in *Russell* v. *Russell*[55] to the effect that "fecundation *ab extra* is, I doubt not, adultery." Lord Merriman criticised the view expressed by the Commission, in the debate on this subject in the House of Lords, where he described it as "utter nonsense." Lord Merriman's view is, in its turn, criticised by Tallin, who describes it as "scarcely logical" on the ground that,[56]

> "He seems in one breath to insist on the necessity for some degree of penetration, and in another attempts to explain Lord Dunedin's dictum that fecundation without penetration is adultery, on the ground that Lord Dunedin was not referring to artificial insemination."

This dictum of Lord Dunedin has played such a large part in all discussions concerning adultery in this context, that it is necessary, before proceeding further, to consider it in some detail here. The first point which must be emphasised is that, despite the fact that

[54a] 1958 S.L.T. 12 (Outer House of the Court of Session). See note 1, *ante*.
[55] [1924] A.C. 687, at p. 721.
[56] *Op. cit.*, at p. 16.

it is so frequently cited in this context, it is, strictly speaking, quite irrelevant to the discussion. The issue in that case was simply whether the wife, who had given birth to a child, could be held to have committed adultery, she being proved to be *virgo intacta*. Lord Dunedin's opinion was simply that if a woman indulges in that degree of intimacy with a man as the result of which she becomes pregnant then, although there has been insufficient penetration to cause rupture of the hymen, she could be held guilty of adultery.[57] This is a view which will be considered in more detail shortly, but it is clear that the opinion provides absolutely no authority for the contention that artificial insemination constitutes adultery. It follows therefore that Lord Merriman's view cannot be criticised for lack of logic merely on the ground that he emphasised that Lord Dunedin was not referring to artificial insemination, for manifestly he was not. It is surely those who rely upon the dictum for a proposition which it will not support that are guilty of lack of logic.

To return, however, to the report of the Archbishop's Commission it is worth noting the view of the Dean of St. Paul's, who stated, in his minority opinion,[58]

> "The lawyers have a right to define adultery in their own way, but I deprecate the adoption by Christian teachers of their materialistic conception. Only on a crassly materialistic hypothesis of the meaning of the words can A.I.D. when carried out at the request of the husband, with due precautions against injustice to others, be called adulterous. The spiritual elements which constitute the sin of adultery are absent."

Finally we may note that the Royal Commission on Marriage and Divorce were opposed to the view that artificial insemination either was, or should be regarded as, adultery. Although they regarded a wife who accepted A.I.D. without the consent of her husband as doing him a grave injury, which "in its consequences is as serious as that of adultery," they declined to accept the suggestion that artificial insemination should be deemed adulterous, and were of opinion that it should be made a separate ground for divorce if resorted to by a wife without her husband's consent.[59]

[57] The possibility of fecundation *ab extra*, which was discussed more recently in *Snowman* v. *Snowman*, *supra*, and *Clarke* v. *Clarke*, *supra*, has been known to the courts for over a century. It is referred to in the medical evidence in *Hunt* v. *Hunt* (1856) Deane 121. See also the reporter's note in *R.* v. *Hughes* (1841) 9 C. & P. 752, which reads: "In the case of *R.* v. *Russen* it is stated that the membrane called the hymen 'is an indubitable mark of virginity,' and that 'in some subjects it was an inch and in others an inch and a half from the orifice of the vagina.' The first proposition appears to be much too strongly put as several cases are mentioned by Dr. Davis (*Elem. of Midw.*, p. 102) and Dr. Paris (1 Par.Fomb.Med.Jur. 203) in which the hymen was entire during the pregnancy, and in one case was obliged to be divided by a surgical operation at the time of the accouchement."

[58] At p. 61.

[59] At p. 31.

In view of this conflict of opinion we must, if we are to be in a position to discuss the relation between artificial insemination and adultery, consider first the nature of adultery in English law. It would appear that there is a controversy with regard to this point. In *Orford* v. *Orford* the view was expressed that any surrender of the reproductive powers constituted adultery irrespective of any considerations of moral turpitude. On the other hand, according to other authorities, the latter is the dominant consideration. Thus, to quote from the judgment in *Badineau* v. *Badineau*,[60] "In all the authorities adultery is defined as 'the sin of incontinence between two married persons, or it may be when only one of them is married.'" As one learned writer has put it,[61] "It is submitted that the gravamen of the crime (*i.e.*, adultery) is the illicit sexual intercourse and not the reproductive potentialities."

That the view taken in *Orford* v. *Orford* cannot be sustained as it stands is clear from the simple reflection that it would lead logically to the conclusion that before adultery could be established it would be necessary to prove, in both parties, an ability to procreate. This was pointed out by Guttmacher, who, in criticising the reasoning underlying *Orford* v. *Orford*, stated,[62]

> "To the obstetrical mind this sounds like so much balderdash. Carrying out this legal premiss to its ultimate conclusion a hysterectomy would be one hundred per cent. protection against the possibility of committing adultery. Certainly if a woman without a uterus has extramarital coitus she cannot contaminate her husband's bloodline, therefore logically she would not be an adulteress. From the physician's point of view it is the intent which is all-important. Adultery and artificial insemination are actually the absolute antithesis of each other. One is done clandestinely to deceive and enjoy carnal pleasure; the other decently and frankly to beget off-spring without the emotional and physical pleasure of coitus. Yet to the court with its mediaeval scholastic point of view they are in the ultimate one and the same."

The Archbishop's Commission clearly recognised the force of this argument, but they attempted to get the best of both worlds by arguing that "It seems to us that adultery involves the surrender *either* of the reproductive powers *or* the organs of generation, whether capable of actual generation or not."

The nature of the concept of adultery in English law can best be seen, it is submitted, by a consideration of those cases in which the point at issue has been the degree of intimacy necessary to sustain a charge of adultery. The difficulties of distinguishing between what Cockburn C.J. in *Robinson* v. *Robinson*[63] referred

[60] [1924] 4 D.L.R. 951, at p. 952.
[61] Elles, *op. cit.*, at p. 663.
[62] "The Legitimacy of Artificial Insemination" (1946) 11 *Human Fertility* 16, at p. 17.
[63] (1858) 1 Sw. & Tr. 362, at p. 398.

to as "indecent familiarities and caresses" and adultery were emphasised by Sir William Scott as early as 1796 in *Elwes* v. *Elwes* [64] in which, referring to the wife's conduct, he stated,

> "If it is not criminal in itself, it is so closely connected with such habits as to give a high degree of credibility to anything more grossly criminal that is stated to be the result."

In that case his Lordship concluded that her conduct was "beyond those limits which even the forms of the world allow in such cases."

Most discussions of this issue today begin with a consideration of the remarks of Lord Birkenhead in *Richardson* v. *Richardson*,[65] in which his Lordship stated,[66]

> "Some suggestion was made in argument in this House that this condition even though inconsistent with penetration was consistent with some lesser act of sexual gratification. If there were evidence of such an act, it cannot be doubted that, whatever view may have been taken in past ages in the Ecclesiastical courts, a decree based on adultery might issue."

Commenting upon this opinion in *Sapsford* v. *Sapsford*,[67] Karminski J. stated,[68]

> "If I understand those words of the Lord Chancellor he had in mind that particular case where there had been, at any rate, an attempt at sexual intercourse, that is by the introduction of the male organ into the female but for one reason or another the attempt had not fully succeeded."

It would appear that his Lordship was thus equating Lord Birkenhead's "lesser act of sexual gratification" with an attempt at sexual intercourse. This view however did not commend itself to Singleton L.J. in *Dennis* v. *Dennis*,[69] in which the problem was again considered. His Lordship stated,[70]

> "I do not think that adultery is proved unless there be some penetration. It is not necessary that the complete act of sexual intercourse should take place. If there is penetration by the man of the woman, adultery may be found, but if there is no more than an attempt, I do not think that a finding of adultery would be right."

Further, it should be noted that in this case Hodson L.J. expressly rejected the view of adultery put forward in *Orford* v. *Orford*. His Lordship stated,[71]

> "Mr. Eley faced the difficulty by seeking to put forward as a test of what is and what is not adultery the possibility of

[64] (1796) 1 Hag.Con. 269.
[65] [1923] A.C. 1.
[66] At p. 11.
[67] [1954] P. 394.
[68] At p. 399.
[69] [1955] P. 153.
[70] At p. 160.
[71] At p. 163.

> insemination and consequently of spurious issue. . . . . I am unable to accept that contention. It seems to me to go beyond the limits of what can be regarded as adultery, and for my part I can find no other sure ground upon which to base my decision in this case than that which was adopted by the commissioner and by my lord, namely, the test of penetration."

If it is thus accepted that penetration is the test of adultery then, at first sight, difficulties might appear to be raised by the decision in *Russell* v. *Russell* to the effect that fecundation *ab extra* may be adultery. It is, however, submitted that the decision may be reconciled if one considers the meaning of the term penetration, for it is perfectly possible for there to be limited penetration compatible with a woman remaining *virgo intacta* yet sufficient for fecundation *ab extra* to occur. It is thus submitted that the remarks of Lord Dunedin in *Russell* v. *Russell* must be taken as referring to fecundation which occurs despite the fact that penetration achieved is insufficient to cause rupture of the hymen, but that, in view of the decision in *Dennis* v. *Dennis*, there can be no adultery unless there is at least this degree of penetration.

That this is a reasonable basis upon which to reconcile the decisions is supported by a consideration of some further remarks of Singleton L.J. in *Dennis* v. *Dennis*. His Lordship remarked,[72]

> "In my view there is no distinction to be drawn between the words 'sexual intercourse' in the definition of adultery which I have read (from Rayden on *Divorce*) and 'carnal knowledge' in the criminal law."

It is quite clear that for "carnal knowledge" there must be penetration even though very slight. Tindal C.J., in *R.* v. *Allen*, put the position as follows,[73]

> "The question, therefore, for the jury, in such a case, is whether the private parts of the man did enter into the person of the woman. It is not necessary to enter into any nice discussion as to how far they entered. However, you must be satisfied that there was an actual penetration, and that it is not the case of a person attempting to commit the offence, and being disturbed before he had actually penetrated."

The mere fact that a woman remains *virgo intacta* does not prevent a charge of rape from being sustained. This was laid down after a discussion among the judges in *R.* v. *Russen*,[74] which was followed in *R.* v. *Hughes*,[75] an earlier contrary dictum of Gurney B. in *R.* v. *Gammon*[76] not being followed.

It is thus submitted that the criterion of adultery in English law is that of penetration, however slight, and even though insufficient to cause rupture of the hymen. If this be correct it

[72] At p. 160.
[73] (1839) 9 C. & P. 31, at p. 34.
[74] Noted in *R.* v. *Hughes*, *infra*.
[75] (1841) 9 C. & P. 752.
[76] (1832) 5 C. & P. 321.

follows that there is no justification for the view taken by the legal members of the Archbishop's Commission, and further that there can be no justification for the view that artificial insemination can under any circumstances constitute adultery. For adultery there must be penetration of the woman by the man, and this condition is not satisfied by the act of artificial insemination.[77]

Before leaving the problem of adultery, brief mention should be made of the position of the married donor. It may be felt that a married donor who donates semen without the consent of his wife is doing her an injury which is almost as grave as that which a husband suffers by his wife's submission to insemination without his consent. It seems quite clear that English law makes no provision for this contingency, and that a husband who donates semen is guilty of no offence whatsoever, whether his wife consents or not.

We must now consider the problem of the legitimacy of children conceived as a result of artificial insemination. Again the issue arises solely in the case of A.I.D., for there is not the slightest doubt that children conceived by A.I.H. are legitimate. Equally it seems fairly clear that, as the law now stands, children conceived by A.I.D. are illegitimate, and this whether the husband has consented to the insemination or not. The position has been well summarised in an editorial in the *Journal of the American Medical Association* as follows[78]:

> "The fact that conception is effected not by adultery or fornication but by a method not involving sexual intercourse, does not in principle seem to alter the concept of legitimacy. This concept seems to demand that the child be the actual offspring of the husband of the mother of the child. . . . if the semen of some other male is utilised the resulting child would seem to be illegitimate. The fact that the husband has freely consented to the insemination does not have a bearing on the question of the child's legitimacy. If it did, by similar reasoning it might be urged that the fact that the husband had consented to the commission of adultery by his wife would legitimise the issue resulting from the adulterous connection."

The view put forward in *Strnad* v. *Strnad* with regard to this point clearly cannot be sustained. As Tallin has pointed out, the case of a child born before marriage and legitimated by the marriage of its parents is quite different from that of the child conceived as a result of A.I.D., for no one has yet suggested that a child born before its mother's marriage will be legitimated by her marriage to a man other than the father.[79]

[77] In *Maclennan* v. *Maclennan*, *ante*, Lord Wheatley held that A.I.D. does not amount to adultery in Scots law. After consideration of the English as well as the Scottish cases he held that adultery involves at least partial penetration.

[78] "Artificial Insemination and Legitimacy" (1939) 112 J.A.M.A. 1832.

[79] It is necessary, of course, to bear in mind that the presumption of legitimacy will apply in these cases, and this would appear to be almost irrebuttable in those cases in which the parties practise such degree of intercourse of which

It follows that children born as a result of A.I.D., being illegitimate, must be so registered, failure to do so being a criminal offence under the Perjury Act, 1911, s. 4. It is a trifle unfortunate that some practitioners who engage in artificial insemination appear to approach this provision with a certain disdain. Barton has written in the *British Medical Journal*,[80] "the couple are informed that the child will be legitimate if the husband is registered as the father; such registration is demanded although it constitutes an offence." It should perhaps be added that Forbes has pointed out that the Council of the Medical Defence Union "hold no brief for any person who knowingly commits perjury at the time of the registration of the child."[81]

Consideration of this problem leads us to the further problem of the legal position of medical practitioners who engage in artificial insemination. There would appear to be little that can profitably be said at this stage. The view of Tallin that if they engage in artificial insemination they may be regarded as having committed adultery is clearly untenable. Manifestly, in the present state of the law, they will be liable as an accessory before the fact if they incite the parents to register the birth of a child conceived as a result of A.I.D. as legitimate, but for the rest the position is adequately summed up by Willink in the *Practitioner*:[82]

> "In artificial insemination, as in any other act of medical or surgical character performed or undertaken by a medical practitioner, it will be expected of him that he will exercise that degree of reasonable skill and care which he holds himself out to possess or to be competant to discharge in the prosecution of his professional work."

It is quite unnecessary to follow Tallin in his consideration of the question whether a physician could be held liable under an implied warranty that the semen he supplies is fit for the purpose. The discussion of such an issue may be an amusing pastime for those who have a taste for that sort of thing, but except for the

they are capable whilst undergoing insemination, particularly since normal medical practice appears to be to ensure that the blood group of the donor is the same as that of the mother's husband.

80 (1945) 1 B.M.J. 40.

81 (1949) 1 B.M.J. 590. Keenan and Ryan in their book *Marriage: A Medical and Sacramental Study* (at p. 188) state that there has been a "legal ruling" in this country since 1948 to the effect that all births produced as a result of A.I.D. shall be registered as illegitimate. The authority they quote for this statement is the *Eugenics Review* (1947) 122. This, however, refers to a report of an article by the late Professor Joad, "The Right to Babies," which appeared in the *Courier* for June, 1947, in which (at p. 63) he stated: "the Ministry of Health has ruled that all births resulting from artificial insemination shall be registered as illegitimate." The Ministry of Health inform me that no such ruling has been issued and no instructions have been sent to Registrars on the subject. The statement by Professor Joad, and that appearing in Keenan and Ryan must, therefore, be regarded as incorrect. I am grateful to the editor of the *Eugenics Review* for information which enabled me to trace these references.

82 *Op. cit.*, at p. 145.

purposes of amusement the issue no more arises in this context than it does, for example, in the case of blood transfusion.

In the preceding discussion we have far from exhausted all the legal implications which may arise from the practice of artificial insemination, and further we have been unable to do more than to consider these implications from the point of view of the existing structure of matrimonial law. It may well be, however, that the revolution effected by the introduction of this technique will require a more searching reappraisal of fundamental principles, and, as a result of this process, legislative intervention may well be seen to be necessary to control and limit a practice which, whilst it is undoubtedly capable of conferring great benefits, is equally capable of great abuse. The first step in any such re-thinking must, however, be a consideration of the relationship between the technique and the existing legal structure. It is to this latter process that we have confined ourselves in this paper, for it will only be after much further discussion of the problem in all its aspects, social, moral and medical as well as legal, that more concrete proposals for legislation can usefully be formulated.

G. W. Bartholomew *

Postscript. Since this article was received the Lord Chancellor has announced during a debate on artificial insemination in the House of Lords that the Government intend to appoint "a small Inter-departmental Committee to inquire into" the subject "and to make recommendations." See Official Report 264, February, 1958, col. 1015. [Editor.]

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IS NEGLIGENCE AN ETHICAL OR A SOCIOLOGICAL CONCEPT?

Ever since *Blyth* v. *Birmingham Waterworks* it has been usual to state the standard for negligence by reference to the "reasonable man," or the "prudent and reasonable man," the terms used by Baron Alderson in his judgment. Sometimes mention is made of the "ordinary" man, the "man on the Clapham omnibus," but hitherto conduct has not been exonerated from being considered negligent merely because it is of the kind ordinarily done by ordinary people. A motorist is not excused because he shows that he acted in accordance with the common practice of motorists. The question of negligence is one of what *ought* to be done in the circumstances, not what *is* done in similar circumstances by most people or even by all people. In so far as negligence is concerned with what ought to be done, it may be called an ethical concept: in so far as it is concerned with what is done, with practice, it may be said to be a sociological concept.[1] The clearest English textbook statement that negligence refers to ethical and not sociological standards is in Salmond on the *Law of Torts*: "the general practice itself may not conform to the standard of care required of a reasonably prudent man. In such a case it is not a good defence that the defendant acted in accordance with the general practice."[2] That passage may now be supported by cases in the House of Lords. Lord Wright has applied the doctrine to professional practice. In *Lloyds Bank* v. *E. B. Savory & Co.*, after stating the precautions which he thought the bank should have taken in the circumstances, he said: "It is argued that this is not the ordinary practice of bankers, and that a bank is not negligent if it takes all precautions usually taken by bankers. I do not accept that latter proposition as true in cases where the ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking."[3]

[1] It is sometimes said that there may be "negligence without fault," but this terminology does not remove negligence from the province of "ethics," as I have used that term. "Fault" in this phrase is taken to refer to an ethical standard of individual morality: an individual is not at "fault" in this sense unless he fails to exercise the care of which he is capable or which is exemplified by ordinary people. Thus, "ethical" negligence, as I use the phrase, involves "negligence without fault." The *locus classicus* for "negligence without fault" is the monograph with that title by Ehrenzweig, University of California Press (1957). See also his "*Full Aid*" *Insurance*, University of California Press (1954), particularly n. 9, p. 41: "A Psychoanalysis of Negligence" (1953) 47 North Western U.L.R., p. 855.

[2] 10th ed. (Stallybrass), p. 437.

[3] [1933] A.C. at p. 233. *Cf.* Lord Normand in *Barkway* v. *South Wales Transport*. "Evidence that the respondents' practice does not fall short of the

It is clearly implied that it is for a court to determine what is "due provision."

In *Bolam* v. *Friern Hospital Committee* [4] this aspect of the law of negligence was not considered in the direction to the jury of McNair J. Negligence was alleged arising from the action of doctors who treated a mental patient with electro-convulsive therapy, in the course of which he sustained severe physical injuries. No relaxant drugs, no restraining sheets, no manual control, had been employed to restrain or control the convulsions produced by this treatment, which caused the injuries, though such techniques were employed by some other specialists. On the other hand, they were not always employed by all doctors. Moreover, the plaintiff had not been warned of the risk of bodily injury resulting from the treatment; and, again, there existed a conflict of medical practice about warning patients, some doctors thinking that warnings of the slight risks might deprive mentally ill patients of their only available hopeful remedy.

It was to the situation arising from the existence of a conflict of medical opinion that McNair J. principally directed his attention. One unexceptionable principle is embodied in his remarks. This is that a practice followed by one body of doctors is not negligent *merely* because it is disapproved of by other doctors. It may be reasonable and prudent nevertheless. Indeed, it is this principle which is specifically stated by the judge in one passage described as "just a different way of expressing the same thought." He said: "a doctor is not negligent, if he is acting in accordance with . . . a practice [accepted as proper by a responsible body of medical men skilled in that particular art], merely because there is a body of opinion that takes a contrary view." [5] On the other hand, there are other passages which suggest that mere conformity with the practice adopted by a body of doctors is itself disproof of negligence. Thus, we find McNair J. saying: "A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art." [6] "Bear in mind that your task is to see whether,

precautions taken by other owners goes only part of the way to meet the case of negligence against them": [1950] 1 All E.R. at p. 402. Lord Reid in *General Cleaning Contractors* v. *Christmas*: "The need to provide against the danger of a sash moving unexpectedly appears to me to be so obvious that, even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken": [1952] 2 All E.R. at p. 1116. In *Paris* v. *Stepney Borough Council* [1951] A.C. 367 there was evidence that the general practice of employers was not to provide goggles for certain kinds of work. Nevertheless, all the judges, including Lord Simonds, who dissented and found that the employers were not negligent, said that the practice was not determinative of negligence. Lord Simonds said: "It is possible that the practice, however widespread, is carried on in disregard of risks that are obvious": [1951] 1 All E.R., p. 46.

[4] [1957] 2 All E.R. 118.

[5] p. 122.

[6] p. 122.

in failing to take the action which it is said Dr. Allfrey should have taken, he has fallen below a standard of practice recognised as proper by a competent reasonable body of opinion." [7] "You have to make up your minds whether it has been proved to your satisfaction that when the defendants adopted the practice that they did, . . . they were falling below a proper standard of competent professional opinion on this question." [8]

This view that conformity with practice cannot be negligent stems from a failure to heed the warning of Stallybrass that the "imagery" of the "man in the street" may be misleading.[9] McNair J. explained the law of negligence to the jury in these terms: "In the ordinary case which does not involve any special skill negligence in law means this: Some failure to do some act which a reasonable man in the street would do, or doing some act which a reasonable man in the circumstances would not do: and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this failure or cause of action is negligent? In an ordinary case it is generally said that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man." [10] But the suggested test, though useful as a guide in many cases, is not a universal test: it omits the important qualification stressed by Stallybrass: "The 'man in the street' does not always show the care of a reasonably prudent man in the circumstances." [9] From the premises of McNair J. it does indeed follow that in "a situation which involves the use of some special skill or competence," and where there are diverse practices followed by those possessed of that skill, then conformity with one of those practices cannot be negligence. But the qualification which has to be added to the premises has to be added also to the conclusion. It is for the court to say

[7] p. 122.

[8] p. 124.

[9] Salmond, *Law of Torts* (ed. Stallybrass), 10th ed., p. 437.

[10] p. 121. This, to use the metaphor of Goodhart, puts the Clapham omnibus man into active service. In a note on *Marshall* v. *Lindsey C. C.* [1935] 1 K.B. 516 Goodhart said the effect of the case was "to place the man in the Clapham omnibus on the retired list." The better statement, however, is that cases like *Marshall* v. *Lindsey C. C.* (Goodhart referred also to *Markland* v. *Manchester Corporation* [1934] 1 K.B. 566: in H.L. (1935) 51 T.L.R. 527) see that he carries out his proper duties. The basic question is what is his scope of employment. He does a useful job in pointing out that the standard of reasonableness is not that of the expert. Chorley, in a note on *Croston* v. *Vaughan* [1938] 1 K.B. 540, could have enlisted his aid for the statement: "in negligence actions the conduct complained of is to be measured by everyday rather than by expert standards" ((1938) 2 M.L.R. p. 69). He becomes not frolicsome but dangerous when he leads judges to say, as the dissenting judge, Maugham L.J., did in *Marshall* v. *Lindsey C. C.*: "An act cannot be held to be due to a want of reasonable care if it is in accordance with the general practice of mankind."

whether the ordinary behaviour of the man in the street, or the ordinary practice of those possessed of "special skill or competence," is reasonable and prudent.

It is, perhaps, going too far to say that McNair J. has entirely omitted the possibility of consideration of a recognised practice as negligence. In the passages already quoted there do occur the epithets "proper" and "reasonable," which may refer to objective qualifications and not to subjective beliefs of those following the practice. This attitude appears more clearly in another passage: "I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent." [11] Moreover, in his survey of the evidence McNair J. referred throughout to the objective reasons for holding that the practice of the defendants was reasonable. He discussed the evidence which had been given of the mortality risk from the use of relaxant drugs, and of the danger of fracture from the use of manual control.

Though it is submitted that the doctrine that mere conformity with practice is legally well established, analysis is required in order that its limits and value may be ascertained. In the first place it is important to distinguish between average practices and average standards, between what the ordinary man does and what the ordinary man thinks ought to be done. His practice is not a necessary determinant of his ethics. *Video meliora proboque, deteriora sequor* applies to peasants and poets. Chorley contends for the view that negligence in motoring cases should be determined by "that which is regarded as reasonable by motorists generally" [12]: this is very different from a statistical average of the conduct of motorists. In the next place, we should consider a distinction suggested by the dictum of Lord Wright in *Lloyds Bank* v. *E. B. Savory & Co.*[13] It will be recalled that he considered a banking practice for failure to provide against a risk. The distinction now to be examined is that between failure to provide against a risk, a fault of omission, and inefficiency in the technique employed to deal with a risk. The failure may be in connection with a known risk, or a risk which ought to have been known. It is true that Lord Wright referred only to risks "fully known to those experienced in the business of banking," but that

[11] p. 121.
[12] (1938) 2 M.L.R., p. 69.
[13] See n. 3.

limitation arises from the facts of the case. It is surely negligent not to provide against risks which ought to have been known. The fact that it was not appreciated by men experienced in the particular province is, of course, strong evidence that it could not reasonably be expected to have been known and guarded against, but not conclusive evidence. Experts may blind themselves by expertise. The courts should protect the citizen against risks which professional men and others may ignore. A doctor in his enthusiasm for a new cure may not properly appreciate the dangers of his treatment: a trade unionist in his concern for less exhausting labour by his colleagues may not properly appreciate the dangers to others from his easier practice. It is sound ethics and good law for a court, judge or jury to condemn a professional practice which does not provide precautions against risks known to the profession or which the court judges ought to have been known.[14] But when the question arises of whether precautions in fact taken are adequate then different considerations may arise. If the practice adopted is one which is designed by those with skill and competence in the particular province to deal with a risk, is it then good law for the court to bring its own judgment to bear on the matter? Frankfurter J., in a case concerned with "matters of geography and geology and physics and engineering," pointed out that the court had no expertise in these matters.[15] Chorley likewise points out that in motoring cases, where the question is one of precautions to be taken against the well-known risks of collisions, a court does not as such possess expertise in driving, even though "the learned

[14] The cases cited in n. 3 constitute authority for the principle that if a risk is "obvious," it is negligence to fail to take precautions against it, whether it was actually known or not. They also constitute authority for the distinction taken in the test between the omission and the inadequacy of precautions. The phrase "fault of omission" comes from a dictum of Lord Dunedin in a Scottish case approved in the House of Lords cases. The Lord President said in *Morton* v. *William Dixon*, 1909 S.C. 809: "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it." I prefer to say, as in the text, that a fault of omission is a failure to provide against a risk which ought to have been known: I see no reason for the further limitations (if such they be) of "obviousness" and "folly."

[15] *Railroad Co. of Texas* v. *Rownan Nichols Oil Co.* (1939) 310 U.S. 573, at p. 583. Professor K. C. Davis comments (*Administrative Law*, p. 940): "If instead of 'geography and geology and physics and engineering' the problems had concerned economics and business . . . would the court have taken the position that 'Plainly these are not' issues for our arbitrament'?" He "limits" the expertise of U.S. judges to "common law, constitutional law, ethical questions, *a priori* reasoning, traditions and philosophies of law and government, the meaning of non-technical words and explanation and interpretation of legislative history" (*ibid.*). Is the correct appreciation of the particular behaviour required to guard against harm to one's neighbour an ethical question? This is itself an ethical or perhaps a meta-ethical question.

trial judge is an experienced motorist." [16] Perhaps the attitude of McNair J. in *Bolam's* case may be "explained" as being concerned with the adequacy of precautions designed by those with skill and competence to safeguard against a realised risk. The case for the defence was that free movement of the limbs was the best precaution against injury. It is uniformity with a practice consisting in a technique of precautions against risks which eliminates negligence. We are, however, far from judicial recognition of a distinction between failure to provide against a risk, and adequacy of precautions. The most that can be said is that *Bolam's* case is consistent with the distinction.

J. L. Montrose.*

[16] (1938) 2 M.L.R. 69. Chorley uses two phrases which may confuse distinct questions. (i) He denies that "the judge is entitled to act on his own opinion of what is correct motoring conduct." (ii) He says: "The correct criterion is not the judge's own standard of driving." All would agree with the proposition that a judge should not expect everyone to drive as carefully (or carelessly) as he. But this is quite a different proposition from one which asserts that a judge must apply an objective standard of reasonable care: a judge who does so is, of course, ultimately bound, after consideration of the problem, "to act on his own opinion of what is correct motoring conduct."

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THE CIVIL SERVANT—A STATUS RELATIONSHIP?

THERE has been considerable reluctance amongst lawyers to admit that the basis of the Crown-servant relationship might be other than contract.[1]

It is true that a number of cases seem to admit the possibility that the relationship between the Crown and its servants is a contractual one.[2] But in contrast there are recent statements to the contrary [3] and thus there is a general atmosphere of confusion which suggests that, if only to attempt to clarify the position, there should be some examination of status as an alternative basis for the civil servant's employment relationship.

ATTRIBUTES OF STATUS

In spite of Austin's well-known statement,[4] it seems to be fairly widely agreed that status is a legal condition involving at least three essential attributes.[5] First, there must be a significant

[1] *Cf.* Richardson, "Incidents of the Crown-Servant Relationship" (1955) 33 Can.B.R. 427: ". . . it can hardly be doubted that the relationship between civil servants of the Crown is one of contract"; Street, *Government Liability* (C.U.P., 1953), p. 112: "It is submitted that there is always a contract between the Crown and a civil servant, in which the term is implied that the Crown may dismiss at will." And see also Logan, "A Civil Servant and his Pay" (1945) 61 L.Q.R. p. 242: "A person who joins the armed forces automatically acquires a particular legal status which is not the case with the civil servant . . . [whose] obligations towards the Crown do not differ materially from those of an ordinary servant towards his master."

[2] See *Dunn* v. *R.* [1896] 1 Q.B. 116; *Gould* v. *Stuart* [1896] A.C. 515; *R.* v. *Fisher* [1903] A.C. 158; *Owners of S.S. Raphael* v. *Brandy* [1911] A.C. 413; *Leaman* v. *The King* [1920] 3 K.B. 663; *Sutton* v. *Att.-Gen.* (1923) 39 T.L.R. 294; *Reilly* v. *The King* [1934] A.C. 176; *Venkata Rao* v. *Secretary of State for India* [1937] A.C. 248; *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227.

[3] See the clear statement of Goddard L.C.J. in *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482, at 500, that the tenure of office of civil servants is not founded on contract. Lord Goddard reiterated this in *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641 at 653–654. And see the statement in *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co., Ltd.* [1955] A.C. at 489. The Court of Appeal upheld the decision of the Lord Chief Justice in the *Hambrook* case but not on the ground that there can be no master-servant relationship between the Crown servant and the Crown. Denning L.J. appears to doubt whether that statement of law is correct (see at 666) but contrast Parker L.J. at 670–671.

[4] "To determine precisely what a *status* is, is in my opinion the most difficult problem in the whole science of jurisprudence": *Lectures in Jurisprudence* (Campbell's Ed.), Lect. xv, p. 401.

[5] *Cf.* the definition of Professor Graveson: "a special condition of a continuous and institutional nature, differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern":

degree of public or social interest in the existence of the condition; second, the condition must be legally relevant in a substantial and general manner; third, the conditions must be such that it can be conferred or withdrawn only by means of some intervention by the State.

If, therefore, the position of the civil servant in the community satisfies these three essentials,[6] there is at least strong evidence that he occupies a legal condition which might reasonably be termed status.

It is clear that there is an important degree of public interest in the imposition of certain legal capacities and incapacities on the civil servant. The public nature of his work demands that his conditions of service are related to public interest in the efficient performance of his official duties. It is for this reason the public servant enjoys certain rights and suffers certain disabilities. In view of what has elsewhere been said [7] it seems unnecessary to labour this point further.

Can it be said that the civil servant's legal position is affected to any substantial degree because of his employment? A member of the Anglican clergy, for example, may not sit in the House of Commons [8] nor can he be compelled to serve on a jury [9] and is similar, in these respects, to a civil servant. But these are restrictions of a specific nature and affect legal condition only in a limited manner. With the civil servant the situation is different. True, his general legal capacity cannot, for example, be considered to be as restricted as that of the infant or lunatic, but the limitations are *in toto* substantial.

Unlike the ordinary employee, the civil servant has no legal redress for summary dismissal without cause or reason assigned and even, perhaps, in spite of a written contract to the contrary.[10] The consequences of disclosing secret information obtained in the course of his employment are criminal [11] and not civil as would normally be the case for a private employee. To accept a gift or reward is forbidden, and any such payment received is deemed

Status in the Common Law (1953), p. 2. In what follows, the writer's debt to this stimulating book and to C. K. Allen's acute and penetrating essay, "Status and Capacity" (1930) 46 L.Q.R. p. 277, is obvious and is gratefully acknowledged.

[6] There are, of course, other attributes of status but the three mentioned seem fundamental in that the absence of any one of them in a given legal condition is probably sufficient to invalidate a claim to status. *Cf.* Graveson, *op. cit.*, Chap. 4.

[7] See Blair, "The Civil Servant—Political Reality and Legal Myth" (1958) *Public Law* 32.

[8] House of Commons (Clergy Disqualification) Act, 1801.

[9] Juries Act, 1870, s. 9.

[10] *Dunn* v. *R.* [1896] 1 Q.B. 116 and see cases cited *supra*, p. 265, n. 2.

[11] Official Secrets Act, 1911, s. 2; Official Secrets Act, 1920, s. 1 (2).

to be an inducement calculated to affect the execution of the civil servant's duty.[12]

He has somewhat attenuated rights with regard to inventions and patents. His capacity to contract is affected by his employment. For example, the conditions under which governmental contracts may be made are strictly regulated,[13] and restrictions are imposed on the civil servant's right to purchase government "surplus stores."

But it is probably in respect of what are commonly known as "civil liberties" that the civil servant's legal condition is most seriously affected.

In order to secure the impartiality of the public official in the performance of his duties the State has compromised his rights as a citizen and his duties as a servant of the community by imposing limitations on his political activities. In the words of the Masterman Committee:

> "The political neutrality of the civil service is a fundamental feature of British democratic government and is essential for its efficient operation. It must be maintained even at the cost of some loss of political liberty by certain of those who elect to enter the service."[14]

These limitations cover a fairly wide area of political activity, both national and local, and, quite apart from the question of adoption as a Parliamentary candidate,[15] affect such activities as: holding office in political party organisations; speaking in public on matters of political controversy; expressing views on such matters in letters to the Press, books, articles or leaflets; canvassing on behalf of a candidate.[16]

And, particularly since 1939, the problem of "security" in Government service has given rise to new demands on the employee, and in some departments not only the civil servant himself but the members of his family may find their affiliations investigated by the Crown.[17]

12 Prevention of Corruption Act, 1916, s. 2. The accused is thus under the burden of proving that the payments were not corrupt. See *R.* v. *Evans* [1923] 17 Cr.App.R. 121.

13 Treasury Circular dated May 27, 1924; see W. A. Robson in *British Government since 1918*, Lord Campion (ed.), p. 102.

14 Report of the Committee on the Political Activities of Civil Servants, June 1949, Cmd. 7718, p. 30, para. 1.

15 The Servants of the Crown (Parliamentary Candidature) Order, 1927 (as amended by the Order of 1950), provides that no person to whom it applies, "shall issue an address to electors, or in any other manner publicly announce himself, or allow himself to be publicly announced, as a candidate or a prospective candidate for election to Parliament for any constituency, until he has retired or resigned. . . ."

16 Treasury Circular, July, 1954.

17 "The Conference . . . recommended that an individual who is living with a wife or husband who is a Communist or a Communist sympathiser may, for that reason alone, have to be moved from secret work . . ." *Statement of the Conference of Privy Councillors on Security*, 1956, Cmd. 9715, para. 15.

This imposes on the civil servant standards of loyalty far more exacting and stringent than hitherto and restricts his political liberty in a manner normally unknown to the private employee.

Thus, the civil servant's legal position may be fairly said to be affected " in a substantial manner " by virtue of his employment.

Finally, in the acquisition or relinquishment of a civil servant's condition, is the intervention of the State necessary, and is the particular legal condition imposed by law regardless of the will of the servant? Clearly, in the appointment of a civil servant, State intervention is necessary. Under an Order in Council no person can be appointed to a post in the civil service unless a certificate of qualification in his favour has been granted by the Civil Service Commissioners.[18] The fact that the candidate for the service undertakes his employment *voluntarily* does not invalidate the claim to status,[19] because having once accepted the offer of employment the conditions of service are imposed automatically on the individual civil servant.

Certainly, the civil servant, unlike the bankrupt or the lunatic, may *legally* relinquish his status at any time. But, as will be suggested below, this legal freedom is highly illusory and in any event presumably a civil servant who resigns will be considered still liable to service rules until his certificate of appointment is cancelled by the Commissioners.[20] So the intervention of an act of some State authority appears to be necessary before civil service status can be acquired or lost.

It seems, therefore, that, in principle, there is nothing basically unsound about postulating a status for the civil servant.

Analogies with Status of Military Servants

In denying that the civil servant has a legal status in relation to the Crown the comparison with the military servant has played a major part. That the member of the forces has a status is generally conceded[21]; but because the judicial treatment of the civil servant as analogous has had unfortunate consequences for the

[18] Order in Council, dated August 3, 1956, Art. 2.

[19] *Cf.* Graveson, *op. cit.*, p. 135: " . . . voluntary status will never be given to a person who has not first performed some act of his own volition on which such status can be predicated." An interesting example of " involuntary " civil service status might be said to exist in the case of employees of local authorities transferred to the National Assistance Board and the Ministry of National Insurance in 1948 on the abolition of the existing Poor Law machinery. These employees had the option of accepting the offer of civil service employment, or not accepting and losing their existing local government appointment. A somewhat Hobsonian choice!

[20] For example, a prosecution under the Official Secrets Acts would probably be competent until the civil servant was officially out of the service. *Cf.* Superannuation Act, 1949, s. 63 (2).

[21] Though contrast Z. Cowen, " The Consequences of *Commonwealth* v. *Quince* " (1945) 19 A.L.J. pp. 2 *et seq.*

latter,[22] there is a strong feeling that any approach to the Crown-civil servant relationship based on status should be rejected because of the wide difference said to exist between the member of the armed forces and the civil employee of the Crown.[23]

Closer examination of the civil servant's position *vis-à-vis* the Crown suggests, however, that his relationship does not differ fundamentally from that of his military counterpart.

First, it is sometimes suggested that a major difference exists between the military servant and the civil servant because of the existence of the system of collective bargaining in the civil service.[24] There is, of course, no counterpart of this system in the armed forces, nor is there anything corresponding to the Civil Service Arbitration Tribunal in respect of military servants of the Crown. But it should be borne in mind that the basic conditions [25] of service in the civil service are arbitrable only up to a certain level of salary and that there is a wide range of conditions of service which are not arbitrable at all—damage to personal property while on duty, recruitment, disciplinary procedure, political activities, for example. With regard to these non-arbitrable matters, the Crown is under a moral obligation to discuss questions arising thereunder with the staff associations. But where agreement is not possible, the official view must prevail—and will be implemented by means of unilateral administrative action. It would seem, therefore, that collective bargaining in the civil service is confined within strictly defined limits, and that although it is true to say with Dr. Logan that collective bargaining " alone places civil service salary questions in an entirely different category from those which arise in connection with members of the armed forces," [26] there are many other conditions of employment to which this does not apply and even with regard to salary it is applicable only up to a certain level. Moreover, it is important to notice that in the case of *Att.-Gen. for New South Wales* v. *Perpetual Trustee Company, Ltd.*,[27] Lord Simonds L.C., in discussing the existence of any basic difference between the legal positions of the soldier and the constable respectively, said, at 489:

[22] *Cf.* Mitchell, *Contracts of Public Authorities* (1954), pp. 35 *et seq.*

[23] *Cf.* Richardson, *loc. cit.*, p. 425: " No useful purpose can be served by trying to analogise from the military servant's relationship with the Crown to that of the civil servant. And indeed it is dangerous to do so because the relationships between the Crown and its military and non-military servants, respectively, are basically similar . . . military servants have a status under the Crown whereas non-military servants have a contractual relationship with the Crown."

[24] *Cf.* Logan, *loc. cit.*, pp. 242, 243.

[25] Basic conditions are: emoluments of all kinds, leave and working hours. See National Whitley Council Arbitration Agreement, Clause 6. Cases concerning individual civil servants are excluded.

[26] *Loc. cit.*, p. 243.

[27] [1955] A.C. 457.

> "Their Lordships share the opinion entertained by all the judges of the High Court that the case of the constable is not, in principle, distinguishable from that of the soldier. Certain differentiating features, such as the right given to the police under the Industrial Arbitration Act, 1940–43, cannot affect the position."

There is, therefore, judicial authority for assuming that wage negotiation differences between the civil servant and the member of the armed forces would not alone be sufficient to place the one in a different legal category from the other.

Second, a distinction is said to arise with regard to the interest taken by the Crown in the domestic affairs of the military and the civil servant respectively. If the soldier allots a certain amount of his pay for the maintenance of his family the Crown will add further allowances and the total sum will be paid direct to the spouse. If the soldier refuses to make an allotment of pay, the spouse can establish her right to support by obtaining a court order, on the strength of which compulsory stoppages will be made from the soldier's pay.[28]

Commenting on this, Dr. Logan says: "The civil service, on the other hand, knows no system of family allowances or compulsory deductions from pay to meet matrimonial obligations."[29] This may have been true of the civil service when Dr. Logan was writing in 1945,[30] but the situation has changed since then.

By the Superannuation Act of 1949,[31] a contributory pension scheme was introduced for the payment of a pension to the widows and children of established civil servants. Although existing civil servants could "contract out" of the scheme, it is compulsory for all who enter the service after July 14, 1949.[32] Thus, just as in the case of the military servant, the Crown will compel the civil employee to meet certain of his matrimonial obligations.

Third, the civil servant is sometimes distinguished from the member of the armed forces on the ground that the latter is vitally connected with the defence of the realm and that public safety may well depend upon him; the civil servant, it is alleged, is in a vastly different position.[33] But, in modern conditions, this

[28] Army Act, s. 145 (2). The same section authorises deductions from the pay of a soldier who has deserted or left in destitute circumstances his wife or any of his legitimate children under the age of sixteen.

[29] *Loc. cit.*, p. 244.

[30] Though by the Superannuation Act of 1935 (s. 2) the Treasury was authorised to permit the surrender of part of a civil servant's superannuation allowance to provide a pension for his dependants. A scheme was established in 1935.

[31] Part I (ss. 1–14).

[32] s. 10.

[33] *Cf.* Beinart, "The Legal Relationship between the Government and its Employees" (1955) Butterworths' South African L.R. p. 32. Grove J. in *Grant* v. *Secretary of State for India* (1877) 2 C.P.D. 445 at 453 described the power of dismissal as being for "the safety of the realm" and of this statement Professor Beinart says: ". . . as regards civilian servants of the Crown, the same considerations do not necessarily apply."

does not appear to be strictly true. It can hardly be contended, for example, that the private soldier in the Royal Army Pay Corps is more vitally concerned in the safety of the realm than a clerk in the Ministry of Defence. In the Statement of the Conference of Privy Councillors on Security, there was clear recognition of the special place in the public service occupied by certain departments:

> "The Report of the Conference deals with the public service generally. But it is implicit in the Report that the Conference recognise that in certain areas of the public service—notably in the Foreign Service—the Defence field and the Atomic Energy Organisation—the need for stringent security precautions is greater than elsewhere. Her Majesty's Government accept this view." [34]

Thus, there are no good grounds for asserting that civil servants, as such, are less vital to the safety of the nation than military servants; in many cases the opposite may well be true.[35]

Fourth, it has been stated that another distinction between military and civil servants of the Crown is that the latter may leave his employment at any time, while the former cannot do so.[36] This may, however, be less accurate than at first appears.

It seems clear that military servants cannot resign without permission.[37] But how real, in fact, is the civil servant's legal freedom to resign? Two factors exist which suggest that the advantages may all lie with the employer. In the first place, the nature of much civil service employment means that the public officer spends much of his working life learning skills and techniques which are of no use in the private employment market. Civil service filing systems, specialised revenue department procedures may take an appreciable degree of expertise to operate, but they have little or no saleable value in commerce or industry. And, in the second place, the civil servant who leaves the service to take up employment which is not "approved employment" has no right to claim any proportion of his pension.[38] This will be a fairly effective discouragement to resignation—as, indeed, it is meant to be.

[34] Cmd. 9715, p. 3, para. 9. Indeed, Professor Beinart recognises the special position of certain departments. See his remarks on the case of *Re Hales* (1918) 34 T.L.R. 341. *Loc. cit.*, 33, 34.

[35] It is doubtful, for example, if production of a Communist Party membership card would prevent a citizen of "calling up" age from being conscripted into the Forces. It would certainly prevent his employment in many parts of the civil service.

[36] Richardson, *loc. cit.*, p. 426.

[37] *Hearson* v. *Churchill and others* [1892] 2 Q.B. 144. In *Kynaston* v. *Att.-Gen.* (1933) T.L.R. 300, it was held that a military officer had no legal redress even if he were detained in the Crown's service against his will.

[38] This is mitigated to some extent by the provisions of section 34 of the Superannuation Act of 1949, which allows voluntary retirement at the age of 50 or over with the rights to appropriate pension benefits which may be paid at once, or on the civil servant's reaching 60, at the discretion of the Treasury.

The nature of the " freedom to resign " of the ordinary employee is, in any case, often illusory; it was with this in mind that Scott L.J. remarked:

> " . . . a man cannot be said to be truly ' willing ' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of the choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will." [39]

It seems at least doubtful, therefore, whether the distinction between the military servant's inability to resign at any time and the civil servant's freedom to do so is as substantial as might at first be supposed.

Fifth, it is certainly true to say of members of the armed forces that " their private lives are subordinated to the overriding claims of the Crown " [40] and it has been judicially stated that, " in the case of naval and military service one of the substantial *rationes contractus* is that there shall be peril to life and limb and possible sacrifice of either or both." [41] But it is submitted that the legal effect of the Crown service upon the private lives of military and civil servants of the Crown does not differ substantially in either case, the difference being one of degree rather than kind.

In a wide variety of minor matters, the civil servant is circumscribed in his private actions in a way quite unlike the ordinary employee. For example, a civil servant who becomes a bankrupt or insolvent must, under pain of dismissal, at once report the fact to the head of his department [42]; where disposals of surplus government stocks take place by sale, the civil servant is forbidden to buy any of the goods offered if he intends to resell them [43]; the Crown exercises strict supervision over inventions made by civil servants [44]; even the moral character of the civil servant is said to be a legitimate concern of the Crown.[45]

[39] *Bowater* v. *Rowley Regis Corporation* [1944] K.B. 476, at 479.
[40] Logan, *loc. cit.*, p. 243.
[41] Lord Shaw in *Owners of S.S. Raphael* v. *Brandy* [1911] A.C. 413, at 415.
[42] Treasury Circular, dated September 3, 1923.
[43] Treasury Circular, dated November 11, 1946.
[44] This is not surprising in cases where the inventor has made use of official information and where the invention is of interest to his particular department. But a Treasury circular of June, 1955, makes it clear that " the fundamental principle is that ownership of an invention made by a servant of the Crown vests in the Crown. Where, however, the invention . . . is alien to the inventor's duties the inventor may be allowed *ex gratia* complete freedom of commercial exploitation. . . . "
[45] *Cf. Statement of the Conference of Privy Councillors on Security.* Cmd. 9715, para. 10: " The Conference recognise that today great importance must be paid to character defects as factors tending to make a man unreliable or expose him to blackmail, or influence by foreign agents. There is a duty on Departments to inform themselves of serious failings such as drunkenness, addiction to drugs, homosexuality or any loose living that may seriously affect a man's reliability."

Nor does this interest in the private life of the Crown employee necessarily cease when he has retired from the civil service.

High ranking civil servants who retire from the service and who want to take up private employment must, in certain circumstances, obtain the approval of the Government before they may do so.[46]

Pensions payable under the Superannuation Acts are automatically forfeited if the pensioner is sentenced to a term of imprisonment exceeding twelve months for treason or felony.[47] And in certain other cases not automatically entailing forfeiture, the Treasury may withhold or cancel a pension if they feel that the nature of the offence makes the continued payment to the offender of a pension from public funds indefensible, for example, in cases of sexual offences or embezzlement of public funds.[48]

The classical statement of the interest of the Crown in the conduct, both public and private, of the official is contained in the report of the Board of Inquiry set up in 1928 to investigate certain statements affecting civil servants, made in the course of the court proceedings in *Ironmonger & Co.* v. *Dyne*.[49] The report states:

> "The first duty of a Civil Servant is to give his undivided allegiance to the State at all times and on all occasions when the State has a claim upon his services. . . .
>
> "It follows that there are spheres of activity legitimately open to the ordinary citizen in which the Civil Servant can play no part or only a limited part . . . his position clearly imposes upon him restrictions in matters of commerce and business from which the ordinary citizen is free."[50]

Finally, it may be contended that members of the armed forces owe obedience to a separate *corpus juris* whereas there is no similar obligation on the civil servant.

But it is surely unrealistic to regard the rules of the civil service as other than a proper system of law, no less effective than that made by Parliament in statutes or the common law of the law courts.[51]

[46] See Memorandum, Cmd. 5517 (1937) presented to Parliament in 1937 by the Prime Minister. Contrast this with the decision in *Mason* v. *Provident Clothing Co.* [1913] A.C. 724, in which a covenant by which an employee engaged himself not to use his skill and labour was held to be void. It is true that a test of "reasonableness" was accepted in the *Mason* case and that possibly the Crown practice would satisfy the test; nevertheless the retired servant's pension would be at the discretion of the Crown, and the courts would be powerless to prevent the application of such a sanction even where they felt it to be unreasonably applied.

[47] Forfeiture Act, 1870, s. 2. Under s. 70 (2) of the Criminal Justice Act, 1948, the Treasury, at its discretion, may restore the pension in whole or in part.

[48] Treasury Circular, October, 1950.

[49] (1928) T.L.R. 497.

[50] Cmd. 3037 (1928), para. 56.

[51] There is also the "negative" aspect of these rules to be considered. They are binding only on the civil servant and not directly on anyone outside the service. But "negatively" everyone is under a legal duty not to interfere with the rights and obligations they confer. *Cf.* Allen, *Law in the Making*, 5th ed., p. 519: "All valid autonomic legislation, however restricted its

Professor Robson has clearly stated the significance of the law of the civil service:

> "The fact that there is very little legislation or case law dealing with the Civil Service does not necessarily mean that there is no law and practice of the Civil Service. There is such a thing as customary administrative law; and I contend that there is a considerable body of customary administrative law and practice regulating the Civil Service. By this I mean a pattern of conduct regulating the relations between the Crown and its servants, involving obligations which are clearly formulated and regularly followed by all concerned. Such a pattern of conduct can give rise to rights and duties which are effectively recognised and observed by the administrative authorities concerned even though they are not enforceable in the courts of law." [52]

Status or Contract as the Basis for Crown-Servant Relationships?

It would appear, therefore, that on closer analysis the legal relationship of the civil servant to the Crown does not differ materially from that of the armed forces. To deny a legal status to one and affirm it for the other seems not only illogical but unrealistic.[53]

Furthermore, the contract approach has confused the real issues because of the need (in view of the peculiar nature of civil service employment) to import into the contract terms like "unilateral," "unenforceable" and "implied term" and so on. These subterfuges would be rendered unnecessary by acceptance of a status relationship; this would make it easier to appreciate the true importance of "the law of the civil service" which is not contractual but legislative in effect.[54]

positive scope, may be said to have this negative, and by no means unimportant, meaning for the whole body of citizens; and it therefore cannot be regarded as something altogether distinct and apart from the general rule of law."

[52] *British Government since 1918*, Lord Campion (ed.), p. 97. Professor Robson also quotes, at p. 98, Ernst Freund's statement that "voluntary and long continued administrative practice has many of the characteristics of law and, under favourable conditions inherent guaranties of fairness, may approach those which are generally associated with the courts of justice." *Cf.* E. C. S. Wade's Appendix to Dicey's *Law of the Constitution*, p. 530: ". . . there are rules contained in Orders in Council and Treasury warrants and minutes which provide the effective law of the civil service." And see also Jennings, *Law and the Constitution*, 3rd ed., at p. 179: ". . . there is a 'law and practice of the civil service' as there is a law and practice of Parliament."

[53] Another possibility is that of the *contrat d'adhésion*; H. B. Sales, "Standard Form Contracts" (1953) 16 M.L.R. p. 318, appears to consider this applicable to the civil servant. It is true that the Crown-servant relationship may resemble that of a *contrat d'adhésion* in that the applicant for a civil service post has no option but to accept employment on standard terms. But after joining the service he may, through his association, vary his conditions of employment within fairly wide limits. This seems different from the position of the individual in the normal case of the standard contract. And see A. Endrey (1955) 29 A.L.J. pp. 333 *et seq.*, for the suggestion that *contrats d'adhésion* are but a species of status.

[54] See Blair, *loc. cit.*, note 7, *ante*, pp. 46–8.

This in turn would put into proper perspective the frequent demands that the Crown-servant relationship should be legally formalised by incorporation of the conditions of service either in a statute or in administrative contracts. This had found favour with a number of writers on the subject,[55] and it is not difficult to see how this might make the civil servant's position more favourable in that he would have the opportunity to obtain legal redress in the ordinary courts of law for breaches of conditions of employment. But it is suggested that this legal formalising of civil service rules is not only unnecessary but perhaps undesirable, for the very practical consideration that the staff associations do not appear to desire that the Crown-servant relationship be "legalised."

The staff side of the National Whitley Council have at different times over the past few years considered the suggestion that the civil servant's conditions of service be put on a legal basis. The most recent discussion of the topic took place in 1952 when there was a full-dress debate on the proposition that staff associations should try "to secure for civil servants the same rights *vis-à-vis* the State employer as are available to persons, other than employees of the Crown, against their employers."[56] The main case against the proposition was accepted by the staff side and was put by one of the principal speakers thus:

> "I would want to see many more bad cases before I could agree that there was a prima facie case for even considering the idea of a contractual relationship. . . . A civil servant without a contract had a life career [*sic*!] but under a contractual system his period of service might well be for a fixed period, not for life. An established civil servant was possibly in a stronger position without a contract of service than he would be with one since the existence of a contract meant that it was open to legal argument, [*sic*!] whereas the security of tenure which was not traditional was rarely threatened.
>
> "Further, trade union action might be prejudiced if officers had individual contracts. In the case of unestablished officers, for example, a contract might be a protection against discharge and would complicate the application of any agreed order of discharge of staff on redundancy. For this reason, against others the staff side pressed not long ago—successfully—that arrangements made with certain established officers should be clearly indicated to be only gentlemen's agreements and not contracts." . . .[57]

The legal correctness of some of the statement made by the speaker quoted above may be open to question but the import of the argument is clear. The civil servant's representatives do not feel that

[55] See Mitchell, *op. cit.*, pp. 240–241; Beinart, *loc. cit.*, p. 71; Street, *op. cit.*, 114–115; Williams, *Crown Proceedings*, Stevens (1947), p. 66.

[56] Quoted from the records of the staff side of the National Whitley Council and made available to the author by courtesy of the Chairman, to whom grateful acknowledgment is made.

[57] *Ibid.*

he is inadequately protected under the existing system of "extra-legal" rules and regulations; nor that legally formalising the Crown-servant relationship would be to his advantage.

The protection offered by the law of the civil service is therefore adequate in most cases and, with the safeguards implicit in the system of collective bargaining, the civil servant has little cause to doubt the efficacy of the internal administrative law which governs the status of the civil servant.[58]

Leo Blair.*

[58] *Cf.* Flanders and Clegg, eds., *The System of Industrial Relations in Great Britain*, Blackwell (1948) pp. 237–238: ". . . . the Whitley system compares favourably with arrangements concerning wages and conditions in some other countries. In the U.S.A. the doctrine of the sovereign legislative employer is accepted by many states, and still largely determines the behaviour of Congress in these matters. Such a doctrine makes lobbying the only effective weapon of civil servants. British civil servants have lobbied successfully in the past, but since they have obtained an effective system of collective bargaining they have made little use of this slow and uncertain method."

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LEGISLATION AND TREATIES

Overseas Trading Corporations

A note on Part IV of the Finance Act, 1957

In general, profits earned outside the United Kingdom by a resident of the United Kingdom are taxable under the Income Tax Act, 1952, to the extent that the United Kingdom tax exceeds that of the country in which the profits are made. Despite the advantages of double taxation relief United Kingdom residents have long complained that they are at a disadvantage in respect of business carried on in an overseas country with low tax rates in competition with firms resident in that country, or resident in another country which also has low tax rates or which does not tax its residents on profits arising outside its territory. Moreover, by section 468 of the Income Tax Act, 1952, a company resident in the United Kingdom cannot, without Treasury consent, cease to be resident here, nor transfer any part of its business to a non-resident. There was considerable controversy as to the economic validity of this complaint and the practicability of granting relief in a manner which would be reasonably easy to administer yet would not provide opportunities for widespread abuse. After a somewhat hesitant recommendation by the Royal Commission on the Taxation of Profits and Income and an acrimonious passage through Parliament, Part IV of the Finance Act, 1957, now gives substantial relief in respect of trade carried on overseas.

Most of the fifteen sections and five schedules of Part IV are concerned with preventing the abuse of the concessions, and in this note it is practicable to give only an outline of the provisions.[1]

The system adopted is to define an entity to be known for tax purposes as an "Overseas Trade Corporation" (conveniently abbreviated to "O.T.C.") and to grant tax exemptions in respect of certain income of an O.T.C. Only a company can qualify as an O.T.C., and to qualify a company must be resident in the United Kingdom and it must either (i) itself be carrying on a trade outside the United Kingdom or (ii) be a non-trading company which has as a subsidiary an O.T.C. trading outside the United Kingdom and has no subsidiaries resident in the United Kingdom which are not themselves O.T.C.s. A company is disqualified from being an O.T.C. (1) if it carries on any trading activities in the United Kingdom or Eire (other than the selling of its products through

[1] For a comprehensive study of the provisions and of their relation to general income tax law, the reader is referred to *Overseas Trade Corporations* by David R. Stanford, Sweet & Maxwell, 1958.

an agent or broker in a recognised market in the United Kingdom); (2) if, purchasing goods from the United Kingdom for resale, it takes delivery otherwise than in accordance with certain strict limitations; (3) if the business of the company is banking or finance, dealing in securities, insurance, shipping or air transport, or the provision of professional or similar services; or (4) if its trading profits are not subject to tax in some other country. A company which qualifies has a fairly wide right to elect not to be treated as an O.T.C., while the Revenue has the power to grant O.T.C. status to a company which has inadvertently contravened the rules and to apply the tax provisions relating to O.T.C.s to a company which has deliberately disqualified itself.[2] In general only if a company has satisfied the above tests in respect of the whole of a year running from April 6 to April 5 is it an O.T.C., and the Commissioners of Inland Revenue determine the status of a company afresh after the close of each year.

The relief granted is to exempt the trading income of an O.T.C. from United Kingdom income tax and profits tax to the extent that it is not distributed to shareholders. When trading income which has been so exempted is subsequently distributed to shareholders, the O.T.C. is chargeable to income tax on that amount and the shareholder is liable to profits tax, if a company resident in the United Kingdom, or to surtax, if an individual resident there. A shareholder not resident in the United Kingdom is not only exempted from profits tax or surtax on the dividend but can reclaim from the Revenue the income tax paid by the O.T.C. in respect of the dividend.

There are three main provisions designed to prevent abuse. First, where any property is sold by an O.T.C at an overvaluation or bought by an O.T.C. at an undervaluation, the Commissioners may direct that, for tax purposes, the profits of the other party to the sale or purchase are to be computed as if the transaction had taken place at the price which would have been fixed if the parties had been independent persons dealing at arm's length. Although not so limited in form, this provision is intended chiefly to prevent the artificial inflation of the exempt income of an O.T.C. and the deflation of the taxable income of another company within the same group. Secondly, there are provisions whereby "grants or loans" to persons controlling an O.T.C. or to directors or members of a director-controlled O.T.C., and distributions to members of the assets of an O.T.C. on winding up, are, to the extent that they are referable to trading income which has enjoyed tax exemption, taxable much as if they were dividends. Thirdly, the provisions of sections 245 *et seq.* of the Income Tax Act, 1952, which entitle the Special Commissioners to make a surtax direction in respect of a controlled company which has not

[2] It is, in certain circumstances, a disadvantage to qualify as an O.T.C.; see below.

distributed a reasonable part of its income, are applicable to O.T.C.s. A "surtax" direction on an O.T.C. has the effect of creating liability for both income tax and surtax in respect of its undistributed income.

It should be appreciated that there is in general no tax advantage in having the status of an O.T.C. where the tax payable in the country where the trade is carried on is as high as, or higher than, United Kingdom tax, nor where it is desired to distribute a large part of the company's trading income. Indeed, because of certain restrictions relating to the treatment of trading losses and capital allowances, there are circumstances in which the achievement of the status of an O.T.C. will be disadvantageous for tax purposes.

M. A. Weinberg.

Coal Mining (Subsidence) Act, 1957

This Act replaces the similarly titled measure of 1950. One important result is that public undertakings and local authorities now join those who will benefit from the principles of compensation accepted by Parliament.

Because these principles are based on the changes in the legal nature of mining operations in this century, these changes must briefly be described. In 1927 a Royal Commission [1] gave an authoritative account of subsidence law, which was brought up to date by the Turner Committee [2] who reported in 1949.

At common law, title is recognised in unsevered minerals, which the owner may convert as a whole into a separate hereditament or convey as single strata.[3] The surface is entitled to natural support from subjacent and adjacent strata. An action for an injunction or compensation will lie if this support is disturbed.[4] Where land is burdened by buildings no natural right of support exists, but it is possible to show that the land would have subsided in its natural state and to recover damages for the injury to the buildings. Alternatively, prescription will give a right of support to buildings.[5]

The common law combined jealous recognition of these rights of support with toleration [6] of an unfettered power to surrender them, exercisable in an innumerable variety of ways. These arrangements, more properly the study of the economic or social historian, bind

1 Cmd. 2899.
2 Cmd. 7637.
3 Cmd. 2899, and *Gowan* v. *Christie*, L.R. 2 Sc. & Div. 273, at 284 (mining leases).
4 Salmond's account is called without "its equal for clarity and brevity." R. F. V. Heuston, *Salmond on Torts*, 11th ed. p. viii.
5 *Quaere*, for interests less than a fee simple: Cheshire, 7th ed., p. 491; R. E. Megarry (1956) 72 L.Q.R. p. 32.
6 Without enthusiasm; but the draftsmen of the mining companies met the challenge.

the present occupiers of surface property, although in the opinion of the Turner Committee their result has been "a total lack of uniformity of surface rights and in individual cases an actual impossibility (short of litigation) of ascertaining what they are." A further encroachment upon the law of support has been made by the series of enactments known together as the Mining Code (1845–1923). In a haphazard fashion they protected certain public services from subsidence damage. The Turner Committee gave very qualified approval [7] to the Code, but regretted its contribution to "the illogical and chaotic state of the law affecting specific properties and types of property."

By the end of the war, coal-mining had been severed economically and legally from the scope of the classical land law. The Mines Act, 1923, Part I, provided that the national interest should always be able to override rights under the law of support. The Coal Act, 1938, "achieved the final operation in the process . . . of separating the ownership of the surface . . . from the ownership of the minerals in all cases in which surface and minerals still remained in the same ownership." [8] In 1946 the coal industry was nationalised, and the National Coal Board acquired all existing rights to withdraw support.[9] The Turner Committee were immediately appointed to consider how the law of support could at last be rationalised.

The Committee emphasised that mining communities alone bore the burden of subsidence damage, although the country as a whole took the benefit of coal. Their view that "a community . . . can suffer not only physical but serious moral and psychological effects from subsidence" impressed Parliament. The existing law of support, based on older views of the relation between property, contract and legislation, required drastic change.[10] They recommended that a right of support should be acquired or retained only in "the national interest, viewed in its widest aspect"; and that "compensation should be provided for all surface interests which suffer damage from subsidence caused by the working of the nation's coal." [11] Neither principle was adopted in the 1950 Act, which gave compensation, irrespective of the general law of support, to a limited class of occupiers of small dwelling-houses. The 1957 Act unifies the treatment of most classes of surface property, but again the planners' approach of the Turner Committee has been rejected.

The Act came into force on July 31, 1957.[12] A free and

[7] Perhaps because it resembles their "Key Points" scheme.
[8] *Ibid.*, para. 17.
[9] S.R. & O. 1946, No. 1674. By s. 48 of the 1946 Act the Board took over liability for subsidence.
[10] Mr. Brendan Bracken protested against the inadequacy of the Labour measures, quoting Addison: "I remember when our island was shaken by an earthquake some years ago, there was an impudent mountebank who sold pills which, as he told the country people, were very good against an earthquake," Hansard, Vol. 474, 800.
[11] The "Key Points" scheme: paras. 58, 69.
[12] By s. 8, certain transitional provisions are made retrospective.

revocable choice is given of proceeding at common law or under the statute.

The opening move in a statutory claim is given to the owner of damaged property or to "some other person who is liable to make good the damage in whole or in part." [13] Service of a damage notice by the claimant puts the Board under a duty to elect between the statutory remedies. Their primary duty is to execute remedial works as soon as is reasonably practicable after the occurrence of any subsidence damage. The Board may elect to pay the cost of repairs instead, or pay compensation in cases where works would be inadvisable. By section 1 (5) the Board must pay for certain first-aid works which have been executed "by any other person." [14]

Cases of loss consequential upon injury and of successive causes of action are admittedly very difficult parts of the law of torts. The Turner Committee were not prepared to interpret the requirement in the Coal Act, 1938, for the payment of "proper compensation" but stated for the future that "any attempt to lay down new standards or principles of assessment would almost certainly create more problems than it solved, and that the soundest course . . . (would) be to adhere to the common law rules as to remoteness of damage." The 1957 Act sets out fairly elaborately the bounds within which the new writ runs; unfortunately the references to redecoration and the rendering of property fit for its original use would only cover damage to household goods by liberal interpretation. Normally compensation will be calculated on an estimate of the cost of repairs. In some cases it will be necessary to refer to the Second Schedule to the Act.[15]

Since the purpose of the Act is to relieve hardship wherever possible, the First Schedule provides a supplementary scheme where dwelling-houses have been made uninhabitable. The Board then has to provide or pay for temporary living accommodation.

Section 12 rectifies the anomalous position under the law of nuisance of those who are killed or disabled "as the result of an injury caused after the passing of this Act by the happening of subsidence damage." The principle of the Fatal Accidents Acts [16] will supplement those of common law negligence in assessing damages. No liability will attach to the Board under this section if the person injured was a trespasser,[17] or the injury was wholly attributable to his negligence. Contributory negligence will bring apportionment.

The cost of repairs and compensation has been estimated at about £5,000,000 a year. This represents about sixpence a ton

[13] *Cf. Paradine* v. *Jane*, Aleyn 26.

[14] *Negotiorum gestio*? Contrast s. 2 (3) with s. 2 (4).

[15] To assess depreciation where repairs are not worth executing: s. 1 (4).

[16] But not of the Law Reform (Miscellaneous Provisions) Act, 1934. It was not wished to extend liability without fault.

[17] Rare; but liable to work injustice under the law of landlord and tenant.

on coal.[18] The cost is to be borne by the Board, who can pass it on to the consumer.[19]

By section 13 (1) most disputes under the Act will go to the county court, the Lands Tribunal, or in Scotland to the sheriff. An attempt to give all disputes to an administrative tribunal failed, because few cases are contemplated, and in these the greater certainty and clarity of a ruling by the courts were preferred.[20] Assessors may sit with the judge.

The moral of the Act is that not all *nocumentum* need be nuisance for remedy, and that benevolent yearnings butter no parsnips.[21]

D. J. Bentley.

The Treaty Establishing the European Economic Community [1]

Only six years after the Treaty setting up the European Coal and Steel Community was signed by France, Western Germany, Italy and the Benelux countries, these same States have concluded a further Treaty by which they virtually unite their respective countries into a single economic unit. Within this unit there is free trade and against the rest of the world there is a unified barrier of taxes.

These six countries have pledged themselves to form a Common Market within a transitional period of the next twelve, or, if necessary, the next fifteen years. Within this period all customs duties on imports between member States are to have been abolished—all duties on goods exported to member States, however, must go within the next three years.

The custom duties to surround the Common Market have been drawn up with alarming precision,[2] but the general principle is that these duties shall be the average of those of the six countries on January 1, 1957.

At the end of the twelve or fifteen years, all restrictions imposed by one member State upon the quantity of imports from the other member States or of exports to those States are prohibited, except such as are needed to protect public morality and to protect national art treasures and so on.

[18] Estimates vary; and the Board would anyway have been faced with a substantial sum to pay without the Act.

[19] Thought to be an incentive to the Board to avoid subsidence, and part of the price of coal.

[20] It was also feared that the relation between the Minister and the Board would be affected.

[21] See Salmond, *op. cit.*, p. 249 (*h*).

[1] The Treaty establishing the European Economic Community is published by the Secretariat of the Interim Committee for the Common Market and Euratom, Brussels, and obtainable from H.M. Stationery Office, price 10s.

[2] Toluene parasulphonyl chloride will, it appears, have a lower protective duty than Homoveratryl amine (list A). The tariff on feathers, skins and other parts of birds with their feathers or down, unworked (other than unworked feathers or down for bedding), may not exceed 3 per cent. (list B).

The free movement of workers is to be ensured, which involves the abolition of any discrimination, based upon the nationality of the worker, as regards pay and working conditions. It includes the right to move about freely and to stay in any member State. A similar right is granted to employers to set up in business in any member State.

Bound up with this are the provisions progressively abolishing restrictions upon the movement of capital belonging to persons resident within the Common Market, and abolishing any discriminations based upon the nationality or country of residence of the investor or the place in which his capital is invested.

Final rules concerning inter-State transport have yet to be laid down, but the Treaty requires a common transport policy to be established to regulate transport crossing from one State to another and to admit non-resident carriers to use the national transport services of member States. Further, no carrier is to be allowed to make different charges in respect of similar goods carried under similar circumstances on the grounds of the country of origin or the destination of the goods.

Any agreements between enterprises or associations of enterprises which are likely to affect trade between the member States and which have as their origin or result the prevention, restriction or distortion of competition within the Common Market are prohibited and declared null and void.[3] Certain of these agreements are enumerated in the Treaty, for example, those directly or indirectly fixing the purchase or selling prices or other trading conditions, or those limiting production, or agreements for the storing of sources of supply or the charging of different prices for similar goods.

Any "dumping" of goods by one State within another is declared illegal, but the situation is left to be dealt with *ad hoc* should it arise. Similar to this is the prohibition of any aid given either directly or indirectly by a member State which threatens to distort competition by favouring certain enterprises or certain productions. However, naturally, there is excluded from this any grants of money that are intended to remedy damage caused by natural calamities, or grants to promote the economic development of regions where the standard of living is abnormally low or where serious under-employment exists.

Together with this long list of "don'ts," the member States agree upon the necessity to promote the improvement of living and working conditions, and acknowledge that this involves what the Treaty ponderously calls "the harmonisation of social systems" and "the approximation of legislative and administrative provisions." This in practice, the Treaty continues, involves close collaboration between member States in such matters as

[3] Exceptions to this are certain agreements contributing to the improvement of production or the promotion of technical progress—Art. 85 (3).

labour legislation and working conditions, social security, protection against occupational accidents and diseases, the law of trade unions and of collective bargaining between employers and workers. Finally, each member State within the next three years is to " secure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers."

The Administrative Organs of the Community

It will be recalled that in the European Coal and Steel Community there is a High Authority consisting of nine persons, who are virtually the directors, that there is a Council of Ministers of one representative from each member State whose consent is required for many of the major decisions of the High Authority, that there is an Assembly of persons elected by the Parliaments of each member State who are virtually the equivalent of the shareholders meeting with power to dismiss the directors of the High Authority and that finally there is a Court of Justice with power to dictate to all of these bodies and to the six governments of the Community as well as to enterprises and associations.

This basic structure has not only been copied by the Economic Community but some of the organs of the Coal and Steel Community have been taken over so that they will in future serve both the Economic Community and the Coal and Steel Community.

The Economic Community will be run by nine directors appointed jointly by the governments of the member States, who together will form what is to be called " The Commission." These directors are to be nationals of one of the member States but no State may have more than two of its nationals as members of the Commission at one time. The period of office is four years but any director may be re-elected. The duty of this Commission is to run the Community, or as the Treaty prefers to put it " to ensure the application of the provisions of this Treaty and of the provisions enacted by the institutions of the Community in pursuance thereof."

A Council of Ministers composed of one delegate from each of the six governments of the member States is to be created, the consent of which is required to many of the more important decisions of the Commission. The vote of each delegate, however, is weighted if a qualified majority is required for any consent.[4]

[4] Where the decisions of the Council require a qualified majority, votes are weighted:

Belgium	2
Germany	4
France	4
Italy	4
Luxembourg	1
Netherlands	2.

Where a unanimous vote is required this can be obtained even though one State abstains, so that no country possesses a veto.

The Assembly, or shareholders meeting, which as has been seen is to be the existing Assembly of the Coal and Steel Community reconstituted, is to consist of 142 members.[5] Initially these members are to be elected by the Parliaments of each of the member States, but the ultimate aim of the Treaty is that there should be direct universal suffrage throughout the Community. The main power of this Assembly is to force all the members of the Commission to resign following a vote of censure adopted by a two-thirds majority of the votes cast, if this represents also a simple majority of the members of the Assembly.

Superior to all these organs, there is to be a Court of Justice composed of seven judges appointed for a term of six years on the joint agreement of the governments of the six member States. Nothing in the Treaty is laid down as to the nationality of the judges. There is nothing, therefore, to limit the number of nationals of one member State, or to prevent a national of a country outside the Common Market from being elected.

This Court of seven judges is to replace the already existing Court of the Coal and Steel Community and be a combined Court exercising the jurisdiction granted to it by the two treaties.

Together with these main organs that are to run the Economic Community there is to be created a European Investment Bank. The function of this Bank will be to grant loans and offer guarantees on a non-profit-making basis to assist the financing of projects for developing less developed regions, to assist the modernising or converting of enterprises and also to assist projects of common interest to several member States which by their size and nature cannot be entirely financed by the States themselves.[6]

This Bank is to be run by a Board of Governors composed of Ministers appointed by the member States, who will be responsible for general policy, and by a Board of Directors who are to be appointed by the Board of Governors for a term of five years on the nomination of the member States and of the Commission

[5] The apportionment of the seats is:

Netherlands	2
Belgium	14
Germany	36
France	36
Italy	36
Luxembourg	6
Netherlands	14.

[6] The capital of this bank is to be supplied by the member States in the following proportion:

Germany	300	million units
France	300	million units
Italy	240	million units
Belgium	86·5	million units
Netherlands	71·5	million units
Luxembourg	2	million units,

where one unit represents 0·88867088 grammes of fine gold.

respectively,[7] who are to have exclusive power over the granting of loans and the fixing of interest rates and so on. Finally, a Management Committee is to be responsible for the day-to-day running affairs of the Bank.

One of the inevitable results of free trade and open competition is that inefficient and obsolete firms are forced either to modernise or to go under. To ease the effects of this a European Social Fund is to be established which is to be controlled by the Commission. This Fund is to provide grants towards the cost of retraining those who must change their employment and to give them a resettlement allowance, and also to give grants to workers whose employment is temporarily suspended or reduced as a result of the conversion of their enterprise to other production so that they may receive the same wages during this period pending their full re-employment.

The Jurisdiction of the Court

The jurisdiction that is granted to the Court is probably unique, for the Court has jurisdiction which on occasions may make it fully a supra-national court, at other times it will be an international court, at others an administrative court and finally at other times a civil court.

Supra-National Jurisdiction

As has been seen above, States are forbidden by the Treaty to grant subsidies and aids either directly or indirectly to any of their enterprises so as to distort competition. If a State were to do so it could be cited before the Court by the Commission.

Similarly, if the Commission considers that a member State has failed to fulfil any of its obligations[8] under the Treaty, that State can likewise be brought before the Court.

International Jurisdiction

One member State which considers that another member State has failed to fulfil any of its Treaty obligations may appeal to the Court.

Further, the Court has competence to decide any dispute between member States in connection with the objects of the Treaty, where this dispute is submitted by agreement.

The Court has power to interpret the meaning of any article of the Treaty and to declare upon the compatibility with the terms of the Treaty of any inter-State or other agreement.

[7] The term "respectively" that is used in the Treaty appears to have a host of possible and conflicting meanings.

[8] The meaning of the term "obligations" is not clear. It may be wide enough to cover "restrictions," on the grounds that restrictions are obligations not to do certain acts.

Administrative Jurisdiction

In its administrative capacity, the Court can control much of the administrative action of the Commission, of the Council of Ministers and of the Bank. The grounds on which the Decisions of the Commission or the Council may be challenged by a member State or by the Council or the Commission are the usual ones in Continental procedure namely, incompetence,[9] violation of a substantial procedural requirement in taking the Decision, *ultra vires*, and *détournement de pouvoir*. The control over the Bank, however, is solely limited to ensuring that the procedural requirements for any decision by the Governors or the Directors have been observed. There is thus no appeal to the Court against a refusal to grant a particular loan, if the requisite procedure has been observed.

Where the Commission or the Council of Ministers have a duty to act and have failed to do so, any of the member States or any of the other organs of the Community may refer the matter to the Court. Any person, whether natural or legal, may also bring a similar action before the Court where the duty in question was to take a Decision affecting him.

Finally, the Court may declare removed from office any member of the Commission who either no longer fulfils the conditions, such as independence and competence, that are required for the performance of his duties or who commits a serious offence. The Court is likewise able to remove one of its own members or to lift his immunity from suit.

Civil Jurisdiction

Where in any contract entered into by the Community a power has been given to the Court to arbitrate upon a dispute that may arise, the Court is competent to decide the dispute.

Further, the Court can hear cases relating to damages as a result of any tort committed by the institutions of the Community or by its employees in the exercise of their duties.

Although the jurisdiction of the Court is thus seen to be amazingly wide, the full story has not yet been told. Many of the decisions that will have to be taken by the Court will involve applying standards that are anything but legal standards. The Court will thus have to determine whether State regulations impose restrictions upon imports *simpliciter*, in which case they are forbidden, or whether they are justified on the grounds of public morality, in which case they are permitted. As, also, restrictions made for the protection of national treasures of artistic, historical or archaeological value are expressly permitted by the Treaty, the Court may one day have to sift the conflicting prejudices of expert witnesses.

[9] This term is the translation of the French "*incompétence*." The term implies lack of legal competence or jurisdiction; it has, of course, nothing to do with physical inadequacy.

Again, the Court will have to determine whether agreements between enterprises are likely to affect trade between member States and whether they have as their object or result the prevention, restriction or distortion of competition within the Common Market, in which case they are void. However, if these agreements do not impose on the enterprises concerned restrictions greater than those needed to attain certain specified objectives and if those restrictions do not enable such enterprises to eliminate competition in respect of a substantial proportion of the goods concerned they are valid.

Finally one may cite the duty that will be upon the Court to determine whether a Government grant is intended to facilitate the development of certain activities or of certain economic regions, in which case it is permitted, or whether it changes trading conditions to such a degree as would be contrary to the common interest, in which case it is forbidden.

D. G. Valentine.

NOTES OF CASES

Self-Serving Conduct

A difference of opinion in the Court of Appeal on the admissibility of evidence is not unknown, and another instance recently occurred in *Corke* v. *Corke and Cook*.[1] This case arose out of a husband's petition for divorce on the ground of adultery by the wife, who was living apart from her husband. At the trial evidence was given that during a night in April, 1955, the petitioner, accompanied by an inquiry agent, went to the respondent's house, where the co-respondent lodged; that they heard a bed creaking in the lodger's bedroom, and also conversation there between the wife and the lodger; that they accused the wife and the lodger of committing adultery together, and that both accused persons denied the charge. In evidence by the respondent, the co-respondent and a medical practitioner, it appeared that, some ten minutes after the accusation, at the request of the lodger the wife telephoned to the doctor, asking him to come to the house to examine herself and the lodger to prove that they had not committed adultery; but the doctor refused, because he thought that the result of any examination could provide only negative evidence with regard to sexual intercourse. The petition was dismissed, and the husband appealed on the ground that the Commissioner had wrongly admitted evidence of the telephone conversation. The appeal also was dismissed, the court being unanimous as to the result, because the alleged adultery was not proved irrespective of this evidence. However, its admissibility was argued and considered; Hodson and Sellers L.JJ. holding that the evidence was inadmissible, while Morris L.J. took the contrary view.

It may be convenient to consider first the judgment dissenting on the question of evidence, since the relevance of evidence is a prerequisite for admissibility, and Morris L.J. held that the evidence was relevant and therefore admissible. "In my judgment," he said, "the essential test as to the admissibility of evidence is the test of relevance."[2] The learned Lord Justice thought that the belief of the accused persons as to the value of an immediate medical examination, and their acting upon that belief, was relevant to innocence and admissible, though the weight of the evidence to that effect might be negligible or might even suggest a guilty intrigue if there was no expectation that the doctor would arrive. Since relevance depends upon normal reasoning, it is suggested that there can be no doubt of the relevance of this evidence. The

[1] [1958] 2 W.L.R. 110; [1958] 1 All E.R. 224.
[2] [1958] 2 W.L.R. at p. 120.

ordinary man in the street, like the co-respondent outside the telephone kiosk, would undoubtedly regard the evidence as relevant, and no sophisticated argument would dissuade him. But it is not the policy of the English law to treat as admissible all relevant evidence. It does not necessarily follow, as Morris L.J. contended, that "if conduct which suggests guilt may be proved, so may conduct which suggests innocence."[3]

Hodson L.J. regarded the evidence as inadmissible on the ground that there is a distinction between words amounting to an admission by a party, which may be proved against him, and words which are in his favour.[4] He thought that the fundamental basis of the rule of exclusion is that such evidence has no probative value.[5] Sellers L.J. thought the evidence both valueless and inadmissible, adopting a dictum that "you are not entitled to give evidence of statements on other occasions by the witness in confirmation of her testimony."[6] Thus the majority of the court seem to have been concerned more with cogency than with relevance; but, if they thought the evidence irrelevant, many will prefer the view of Morris L.J. on this aspect of the case. However, assuming the evidence to have been relevant, its admissibility was treated by the majority as governed by the rule that statements by a party in his own favour are excluded. This rule does not necessarily involve the further exclusionary ground of hearsay.

The subject of the present appeal was the "contents" of the telephone conversation, but they were not rejected by the higher court as constituting hearsay; indeed, the conversation was not tendered primarily to prove the truth of what either the wife or the doctor said, and therefore was not hearsay; while their own previous statements were apparently proved by the witnesses themselves, no fundamental distinction being drawn between such evidence and its confirmation by the other party to the conversation. Evidence of the conversation was narrative, in part at least; and that part of it was possibly inadmissible as narrative, if it was properly regarded as evidence of statements. Yet the evidence held inadmissible was evidence less of statements than of conduct; for spoken words may amount to conduct in the law of evidence as in other branches of law. Perhaps evidence of another person's conduct may be within the rule against hearsay, when the evidence is tendered to found an inference as to the belief of the actor. Such an explanation may be given of *Moriarty* v. *London, Chatham & Dover Railway Co.*,[7] cited by Hodson L.J., where conduct was received as an admission, for admissions form an exception to the rule against hearsay. In the present case, however, the principal

[3] p. 121.
[4] p. 114.
[5] p. 117.
[6] pp. 124, 125.
[7] (1870) L.R. 5 Q.B. 314.

evidence was given by the actors. Viewed solely as conduct it does not seem to have been inadmissible as hearsay. Nevertheless, in whatever way the telephone conversation should be regarded, it was open to the objection that it was "self-serving." The objection is sound when applied to corroboration, for it is now recognised that a witness cannot provide his own corroboration; apart from the facts that his statements before trial cannot normally be repeated by other witnesses without offending the rule against hearsay, and that they cannot be repeated by himself in the witness-box without offending the rule against narrative, they are not corroborative because they all come from the same source and a lie is no less a lie because it is repeated a dozen times. It may be said that the truth is no more the truth because it is repeated a dozen times; but that retort does not wholly dispose of the relevance and cogency of consistent conduct; and it may well be asked whether, as a matter of policy, evidence of such conduct should be admissible in appropriate circumstances.

There already exist exceptions to the rule excluding self-serving statements, some exceptions being in favour of one party and some in favour of the opposite party. For example, a self-serving narrative written by a witness before trial, such as an entry in a ship's log-book, may be admitted under the Merchant Shipping Act, 1894, s. 239, and, unless made at a time when proceedings were pending or anticipated, under the Evidence Act, 1938, s. 1.[8] Oral complaints of rape and other sexual violence constitute a long-established exception; and in the Divorce jurisdiction evidence of the fact of a complaint of non-sexual violence has been received.[9] Statements constituting part of the *res gestae* may form another exception. In the present case oral evidence of the denial of adultery by the persons charged was received apparently without objection.[10] It is true that the denials were made in the presence of the petitioner; but the admissibility of statements which do not amount to admissions, made by one party to the other, is a subject which itself requires rationalisation. Again, it is a common practice in criminal trials for the prosecution to give in evidence the denial of the prisoner when charged out of court, though the denial may be made in the absence of the actual or nominal prosecutor and too long after the offence to form part of the *res gestae*. There is at least one exception to the rule excluding evidence of conduct by the accused which is self-serving. It not infrequently happens that an accused person is proved, for the purpose of showing his consciousness of innocence, to have continued his normal life after the crime charged was committed.

To adapt the dictum of Morris L.J., if conduct which suggests

[8] See Practice Note [1953] 1 W.L.R. 262.
[9] See *Berry* v. *Berry* (1898) 78 L.T. 688; also *Fromhold* v. *Fromhold* [1952] 1 T.L.R. 1522, at pp. 1526, 1528, C.A.; note in (1952) 15 M.L.R. 494.
[10] [1958] 2 W.L.R. at p. 113.

guilt may be proved, conduct which suggests innocence should be admissible. Sellers L.J., however, sought to justify the rule excluding self-serving evidence on the ground of expedience. "Whether this rule is strictly logical or not," he opined, "it is one which keeps the evidence to the main issues in dispute and tends to avoid deception of the court by a resourceful witness." [11] The first reason is an argument in favour of nearly every rule of exclusion, whether desirable or otherwise. The second reason ignores the fortunate fact that many witnesses are neither deceitful nor resourceful, and the possibility of deceit seems an inadequate reason for the exclusion of their testimony. Further, though an occasional witness may succeed in deceiving a court, this risk is not peculiar to self-serving evidence; if it is a valid ground for excluding such evidence it is an equally valid ground for excluding all oral testimony. Clearly, the rule excluding evidence of self-serving statements or conduct requires re-examination. When less emphasis is placed upon inadmissibility, and more upon the cogency of relevant evidence freely admitted, one step will have been taken towards the reform of the law of evidence. Sometimes self-serving evidence may have little or no weight, but occasionally it might effect a happy conjunction between Law and Justice.

G. D. NOKES.

FAIR WEAR AND TEAR

"IT is a little curious," said Bruce J. in 1901, "that there is no very satisfactory authority as to the meaning of the words fair or reasonable wear and tear." [1] Since 1901 leases bearing such words as an exception to a covenant to repair have been before the courts on a number of occasions, but despite the latest decision in *Brown* v. *Davies* [2] we may still bemoan the absence of any very satisfactory authority as to their meaning.

In 1928, in *Haskell* v. *Marlow*,[3] the Divisional Court carefully reviewed such authorities as then existed and held, in effect, "that this exception is not to be construed as making any great or grave inroad on the general liability to repair." [4] In that case the tenant was bound to keep a house "in good repair and condition (reasonable wear and tear excepted)." She lived in the house for over forty years, but although she did nothing actively to injure the house she did little to counteract the natural process of decay, and the premises were allowed to get into a very shocking state of disrepair. The court held that the exception did not protect the tenant, who was therefore liable.

[11] p. 125.
[1] *Terrell* v. *Murray* (1901) 17 T.L.R. 570, D.C.
[2] [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401 (C.A.).
[3] [1928] 2 K.B. 45.
[4] *Per* Salter J., at p. 53.

The words came before the Court of Appeal for the first time in *Taylor* v. *Webb* [5] and the court unanimously overruled *Haskell* v. *Marlow*. In *Taylor* v. *Webb* the words were incorporated into an under-lease by reference. In sub-letting the premises the tenants, in their capacity as under-lessors, covenanted to "keep the outside walls and roofs properly repaired . . . as and so far only as is required to be done by them" under the head lease. In the head lease they had covenanted as tenants to "keep the premises in good and tenantable repair (. . . fair wear and tear excepted)." The under-lessors failed to repair the roof and, as a result of wind, rain and decay, some slates cracked and slipped. Water entered in increasing quantities and the rooms under the defective roof became dilapidated, uninhabitable and derelict. The Court of Appeal held that the under-lessors were not liable to their tenant, being protected by the exception.

At the time this decision came as a surprise to the profession. A contemporary writer protested that "It is a recognised principle that where for a long time conveyancers have, in reliance upon past decisions, used a particular form of words to express a particular meaning, the very strongest of reasons will be needed to induce the courts to reverse the old-established decisions which have been so acted upon by the profession. The reports of *Taylor* v. *Webb* contain no indication that the Court of Appeal accorded any consideration at all to this aspect of the question." [6]

Nevertheless, it was plainly impossible to attack the validity of the decision on this ground, and the profession had perforce to accept the decision as good law, so that it found its way without criticism into most of the textbooks.[7] Megarry and Wade on *The Law of Real Property* (1957) may be cited as an example of the generally accepted effect of the case: "It [the fair wear and tear clause] excludes liability for the ordinary occurrences of life and confines the operation of the [repairing] covenant to such matters as wilful damage, and fire, floods and other extraordinary events." [8]

It is probable, to put it no higher, that where the exception has been used in a lease since 1937 the parties' solicitors have had in mind *Taylor* v. *Webb* in advising their clients whether to accept the repairing covenant in that form; there may well be cases where covenantors would not have undertaken any obligation to repair but for those words. But if the settled expectations of conveyancers acting for covenantees were shattered in 1937, those of conveyancers acting for covenantors have now received equally rude treatment. *Taylor* v. *Webb*, a decision of the Court of Appeal, has not been overruled by the Court of Appeal: that, of course, is

[5] [1937] 2 K.B. 283.
[6] "The Fair Wear and Tear Clause," by L. A. Blundell (1937) 2 Conv.(N.S.) 1, at p. 9.
[7] Only Woodfall, edited by Mr. Blundell, seemed to attack the decision.
[8] p. 634.

not possible. But in *Brown* v. *Davies*,[9] the Court of Appeal has distinguished it virtually out of existence.

In *Brown* v. *Davies* (where, unlike *Haskell* v. *Marlow* and *Taylor* v. *Webb*, the judgments were not reserved) the tenant of a bungalow agreed "to use and occupy the said premises in a fair and tenantable manner and keep the interior clean and in good repair and condition and decorated except as to dilapidations or damage resulting from reasonable wear and tear . . ." For about five years, from 1952 to 1957, the tenant failed to repair or redecorate: there was evidence of cracked and flaking plaster, paper peeling in one room, and dirty walls and tarnished decoration, with slight signs of damp in the bedroom.

It will be seen that the tenant's fault was of a similar nature to that of the tenant in *Haskell* v. *Marlow* (though for a much shorter period), and was far less serious than the failure of the under-lessor to repair in *Taylor* v. *Webb* in so far as the failure did not lead to ever-increasing damage of a more serious type. Yet the Court of Appeal in *Brown* v. *Davies*, by holding that *Taylor* v. *Webb* "must be regarded as a case (as indeed it was) dealing with a covenant in a very special form and with special circumstances, and that it does not form the foundation for a general statement of the law,"[10] held that the tenant was in breach of his covenant.

It is a truism that, in the words of Lord Evershed M.R., "the question of the construction of any covenant must depend upon the words of the particular covenant sought to be construed,"[11] but it is very important that practitioners using the time-honoured words "fair wear and tear excepted" should have some idea of the meaning the court is likely to give to them. There is no "right meaning" of such words: what is important is that there should be a known and certain meaning. We must therefore look to judicial decisions in an attempt to obtain a general rule for future guidance.

If *Brown* v. *Davies* lays down any rule of application to broadly similar facts, it seems to follow that *Haskell* v. *Marlow*, a far stronger case, was rightly decided. But it is clear that the Court of Appeal in *Taylor* v. *Webb* thought that *Haskell's* case would, if rightly decided, govern the case before them (Slesser L.J. said that it "seems indistinguishable from the present case," and du Parcq J. so held at first instance). The Court of Appeal, in reversing du Parcq J., therefore thought it necessary expressly to overrule *Haskell's* case. Presumably, in the light of *Brown* v. *Davies*, we must now assume that that unanimous overruling was merely *obiter*.

Both Lord Evershed M.R. and Romer L.J. supported their

[9] [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401.
[10] *Per* Romer L.J. [1957] 3 W.L.R. at pp. 828–829; [1957] 3 All E.R. at p. 408.
[11] [1957] 3 W.L.R. at p. 825; [1957] 3 All E.R. at p. 406.

restrictive distinguishing of *Taylor* v. *Webb* by pointing out its inconsistency with the address to the jury of Tindal C.J. in *Gutteridge* v. *Munyard*.[12] Lord Evershed cited the following quotation, given in Woodfall on *Landlord and Tenant*: "What the natural operation of time flowing on effects, and all that the elements bring about in diminishing value, constitute a loss, which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised."

Two points on this deserve comment here. First, it is probably unfair to state, in Romer L.J.'s words, that "the statement of the law by Tindal C.J. [was not] brought to the attention of the court" in *Taylor* v. *Webb*. Although it is true that *Gutteridge* v. *Munyard* is not referred to by name in *Taylor* v. *Webb*, it was discussed, but not relied upon as an authority of any value, in *Haskell* v. *Marlow*, and in the reserved judgments in *Taylor* v. *Webb* that case was subjected to a detailed analysis and criticism. Secondly, it is far from clear how far Tindal C.J. was, in the words cited, dealing with the clause "reasonable use and wear thereof in the meantime only excepted." He may have been laying down a general rule as to the obligations of the tenant under a covenant to repair an old building, for the same judge's summing-up in *Harris* v. *Jones*,[13] where there was no "wear and tear" clause, is strikingly similar. The Court of Appeal may, perhaps, have been misled by reading the quotation from Tindal C.J. in Woodfall, for that quotation omits the opening words which immediately precede the quotation as given above. Tindal C.J. in fact commenced by saying: "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term."[14]

What, then, is the present position? Leaving aside the possibility that a later Court of Appeal might consider *Brown* v. *Davies* to be in conflict with *Taylor* v. *Webb* (thereby leaving the court free to choose between them), it seems that *Taylor* v. *Webb* has been effectively overruled, unless the very facts recur, and that for all practical purposes *Gutteridge* v. *Munyard* (rejected in *Haskell* v. *Marlow*) has been resurrected and *Haskell* v. *Marlow* (overruled in *Taylor* v. *Webb*) has been exhumed. But there is still no very satisfactory authority; and this state of affairs is more than a little curious today.

Aubrey L. Diamond.

[12] (1834) 1 Moo. & R. 334; 7 C. & P. 129.
[13] (1832) 1 Moo. & R. 173.
[14] 1 Moo. & R. at p. 336.

Enticing and Harbouring Spouses

The unusual facts of *Winchester* v. *Fleming* [1] attracted a good deal of attention in the daily press. The plaintiff and the defendant had compromised an earlier action, in which it had been alleged that the defendant enticed away the plaintiff's husband, on terms which included an undertaking by the parties not to "interfere" with each other thereafter. Despite the compromise, the plaintiff's husband continued to live at a cottage on the defendant's property, taking his meals at her house. The plaintiff claimed that the defendant had broken the agreement on the ground, *inter alia*, that the defendant had "interfered" with her by harbouring her husband against her will. In order to determine whether the defendant could be said to have "interfered" with the plaintiff by doing this, Devlin J. thought it necessary to decide whether, apart from the agreement, it would be an actionable wrong for the defendant to harbour the plaintiff's husband, and the case is reported on this point.

Though he acknowledged that harbouring had at one time been recognised as a separate tort, there seems to be no reported decision in which a defendant has ever been held liable for harbouring *simpliciter*, and Devlin J. expressed strong doubts whether such an action would lie in modern times. The reason, he pointed out, why harbouring was at one time thought objectionable was that it interfered with the economic process whereby a wife, unable to get food or shelter elsewhere than in the matrimonial home, would be compelled to return to it. But this, he thought, was "no longer an accepted method of effecting a matrimonial reconciliation. Parliament recognised that such methods were obsolete when by the Matrimonial Causes Act, 1884, s. 2, it abolished the process by which spouses who refused to obey a decree for restitution of conjugal rights were imprisoned until they did. Society would not today tolerate a vindictive husband who hounded his wife, however grievously she might have erred, from house to house through the ranks of her friends and relations in order to recapture her, as one might a fugitive slave. What if she was driven to seek public assistance? Would the Crown or some local authority then be liable for harbouring? In a society that is organised on the basis that everyone is in the last resort to be housed and fed by the State, the bottom has dropped out of the action for harbouring."

In the event, however, since it was the wife and not the husband suing, Devlin J. did not in fact find it necessary to decide whether the husband's right to sue still existed. Whatever might be the position of the husband, there was, he held, no authority at all for the proposition that a wife could sue for

[1] [1957] 3 W.L.R. 1023; [1957] 3 All E.R. 711.

harbouring *simpliciter*, without enticement, and even supposing that the action was still available to the husband, he was not disposed to extend a similar remedy to the wife on the ground simply that a wife should have the same marital rights as her husband. The right of either a husband or a wife to sue for enticement, which was recognised by the House of Lords in *Best* v. *Samuel Fox & Co., Ltd.*,[2] was, he thought, still compatible with modern ideas, since enticement involves the deliberate breaking-up of a marriage. An action by a wife for harbouring *simpliciter* would, he pointed out, in any case be a mongrel product, since the idea of a wife having quasi-proprietary rights in her husband "would have found no greater favour in the eighteenth century than it does in the twentieth."

Devlin J. thought it unfortunate that the "important decision" of Denning L.J. in *Gottlieb* v. *Gleiser*[3] had not been fully reported, and a report of the case now appears as a note to *Winchester* v. *Fleming*. In *Gottlieb* v. *Gleiser*, Denning L.J. (sitting as an additional judge of the Queen's Bench Division) held that an action for enticing away a spouse could be brought only against persons in the position of a lover or mistress, and that a husband could not sue his mother-in-law for enticing away and harbouring his wife. He thought it altogether unseemly that families should bring such disputes into courts of law. "If," he said, "a husband is to keep the affection of his wife, he must do it by the kindness and consideration which he himself shows to her. He must put his faith in her, trusting that she will be strong enough to thrust away both the possessiveness of her parents and the designs of would-be lovers. If she is weak and false to her trust, the harm cannot be righted by recourse to law; nor is money any compensation."

The plaintiff was not represented in *Gottlieb* v. *Gleiser*, and the grounds for the decision are not entirely convincing, either in law or policy. Actions for enticement have not always been confined, as Denning L.J. supposed, to claims against a lover or mistress who entices a spouse away. In *Smith* v. *Kaye*,[4] for example, the defendants in a successful action for enticement were the brother and brother-in-law of the wife. Nor is it true, as Denning L.J. stated, that the House of Lords in *Best* v. *Samuel Fox & Co., Ltd.* said that the action for enticement is an anomaly which should not be extended. On the contrary, Lords Goddard, Oaksey and Reid expressly approved of enticement actions and distinguished them from the sort of claim in *Best's* case as being based "on the well-established principle that the violation of a legal right committed knowingly is a cause of action." If the

[2] [1952] A.C. 716.
[3] Previously reported only in *The Times*, March 5, 1955.
[4] (1904) 20 T.L.R. 216.

action for enticement is to be explained on this broad principle, it is difficult to see why an action should not lie against any person who entices one spouse away from the other, on the same principles as govern liability for interference with contract. The special case of parents and other close relatives who, acting in good faith and out of genuine solicitude, induce one spouse to leave the other, could be met, as in many United States jurisdictions, by requiring proof of actual malice or improper motive in such a case.

On broad grounds of policy also, it is not easy to see why liability for enticement should be confined to the case of a lover or mistress. Once the damage is done, and the marriage broken up, it may be true, as Denning L.J. said, that "the harm cannot be righted by recourse to law," but this consideration does not necessarily, or even ordinarily, entail that there should be no remedy for the damage done. Parents are not always inspired by the highest of motives in trying to rescue a child from an "unfortunate" marriage. If the social interest in the due performance of contracts is sufficiently strong to make it an actionable wrong, without proof of malice, for a third party to induce a contracting party to break a contract with the plaintiff, it is a little difficult to see why a person (other than a lover) who deliberately breaks up a marriage should be exempt from liability. Denning L.J. laid stress on the unseemliness of bringing family disputes into courts of law, and there is no doubt that he found *Gottlieb* v. *Gleiser* a distressing case. But the courts often entertain equally distressing disputes in defended divorce petitions, and it can hardly be suggested that the boundaries of the law of tort should be influenced to any great extent by the embarrassing character of certain kinds of dispute.

In some of the recent cases involving claims for loss of consortium and loss of services, the courts seem to be in danger of throwing out the baby with the bath-water. It is not safe to assume, because a particular cause of action derives from a time when a husband was regarded as having a quasi-proprietary interest in his wife, that it is therefore necessarily an anachronism at the present day. The common law has often adapted old materials to new purposes, as the growth of the modern tort of interference with contract shows. Though the quasi-proprietary interest of a husband in his wife is undoubtedly an anachronism, society has still a high interest in the protection and nourishment of family life, and causes of action which protect this interest deserve to be judged by their social effects rather than by their historical antecedents. Judging by this standard, it is possible to agree with Devlin J. in *Winchester* v. *Fleming* that the bottom has now dropped out of the action for harbouring, where there is no

enticement, while at the same time doubting whether actions for enticement should be, or indeed are, as limited in scope as Denning L.J. thought in *Gottlieb* v. *Gleiser*.

Douglas Payne.

The Arrived Ship

Agrimpex Hungarian Trading Company v. *Sociedad Financiera de Bienes Raices: The Aello* [1] illustrates odd consequences of burning political problems. The case arose from a purchase by Hungary, until its post-war dispensation a granary of Europe, of cereals in the Latin American market. The cargo was shipped at Eva Peron, formerly La Plata, and now again La Plata, after another change of régime. The cargo was carried in a ship registered in Panama, flying the Costa Rican flag and chartered in Hamburg, Germany. And yet the dispute between Hungarian buyer and charterer and the shipowner was fought out in the Strand, London—strong evidence that the true ownership of the vessel was obscured by the consequences of an economic dispensation that has led to ships operating under so-called flags of convenience.

But the legal interest which this case arouses is no less great, so much more because it is a test case that will reach higher courts. The plaintiffs, buyers of a cargo of maize, chartered the defendants' ship. When it arrived at La Plata, the loading port, it encountered a situation the salient features of which were the following: Under port regulations, made between signing the charterparty and arrival, to relieve congestion in the docks, ships had to anchor in the Roads until a berthing permit was issued. This would not be done unless the ship could produce a certificate of the Grain Board, to be obtained by the shippers, that the required cargo was available. No cargo was available for over a fortnight. The present action was by the charterers for the return of demurrage paid under protest. In substance Ashworth J. held that the shipowners were entitled to keep the money.

In the words of Scrutton, *Charterparties and Bills of Lading*, "there is probably no region of English case law in which it is more difficult to reconcile all the decisions . . . than that (of the arrived ship). The principles involved have been reviewed at intervals. . . . It seems unnecessary to follow the various heroic efforts made to explain or reconcile such cases at various times and by various judges." This is one of the periodic reviews.

The difficulty of this case, as of earlier ones, was that two absolute duties confronted each other, for the ship must arrive at the place promised in the charterparty and the charterer must provide a cargo. Where the contract is a port charterparty the

[1] [1957] 1 W.L.R. 1228; [1957] 3 All E.R. 626.

shipowner has performed his duty and weathered the risk of non-arrival when he reaches the commercial port, which may vary according to the nature of the cargo. Where the charterparty provides for a berth or other place the risk of non-arrival runs until the ship reaches that berth or place. Once the ship has arrived the charterer must provide the cargo or at any rate a reasonable proportion of it so that loading can begin.

The crucial point of the present case was that the ship was unable to arrive until a cargo was available and that the charterer contended that his duty did not arise until arrival. The argument thus tended to move in a circle, which Ashworth J. broke by holding that where the charterer's failure to provide a cargo prevents the ship from becoming an arrived ship he is liable in damages. This failure of the charterer must be the cause of non-arrival, for, according to *Arden Steamship Company* v. *Andrew Weir & Co.*,[2] the charterer is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either party. When congestion in the port prevents the ship's admission to dock, berth or other customary loading place, congestion is the cause of the delay, the risk of which is on the shipowner, unless, of course, the charterparty contains a clause making demurrage payable even if a loading place is not immediately available.[3]

The learned judge's decision is in accordance with principle. Lord Asquith said in *William Cory* v. *London Corporation*[4]: "In general . . . a term is necessarily implied in any contract whose other terms do not repel the implication, that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of breach." These words were spoken in a case where the defendants had made performance by the plaintiffs more arduous by making new by-laws, but the court held that no term could be implied in contracts to which a local authority was a party that no such by-laws would be made during the currency of the contract, since such a term would be repugnant to the public duties of the authority. If the new by-law should throw a burden on the other party that made performance commercially impracticable the contract was frustrated.

An interesting point relating to agency was brought out at the end of the judgment. The plaintiffs argued that the defendants, through their agents in La Plata, had been fixed with knowledge of conditions in that port and had thus agreed to the delay. This contention was rejected in the particular case for several reasons, one of them being that the duty of the ship's agent only arose in the course of the performance of the contract and that the

[2] [1905] A.C. 501.
[3] *Roland Linie* v. *Spillers* [1956] 3 All E.R. 620, where such a clause referred to discharge.
[4] [1951] 2 K.B. 476, 484.

agent had taken no part in the negotiation of the charterparty. In these circumstances the defendants could not be taken to have contracted in the light of the agent's knowledge.

O. C. Giles.

Tax Aspect in Salvage Awards

The question raised in *Island Tug & Barge, Ltd.* v. *Owners of the S.S. Makedonia* [1] was whether it was proper in law for the court, when assessing the amount of salvage to be awarded to the owners of a salvage vessel, to add to the salvage award a further sum representing or "on account of" the tax which the salvors would have to pay under the fiscal laws to which their company was subject on the profit shown on the particular service.

In an earlier case *The Telemachus, Tantalus* (*Owners, Master and Crew*) v. *Telemachus* (*Owners*) [2] salvage services were rendered to the *Telemachus* by a sister ship, the *Tantalus*. The master and crew of the *Tantalus* put forward a salvage claim, and during the course of the argument Willmer J. himself raised the question of tax, asking whether any members of the crew would have to pay tax on any award made. The learned judge said that he raised the point more particularly having regard to the decision of the House of Lords in *British Transport Commission* v. *Gourley*,[3] and observed [4]: "It appears to me that in principle the same considerations as apply to an award of damages in favour of an injured plaintiff should properly also apply to an award of salvage in the case of a plaintiff who has performed personal services. . . . In modern conditions it seems to me that it would be quite unreal, when one is dealing with personal services, to ignore the possible effect of taxation on the amount of the salvage award. If one were to ignore it, it seems to me that one would be cutting at one of the root principles on which salvage is awarded, namely, that of encouragement to mariners to perform services of a salvage nature. If allowance is not made for the fact of taxation, it simply means that the reality of the award made in cases of this sort is so much the less. In those circumstances I have thought it right to take that matter into consideration." Accordingly the awards which he pronounced were larger than they would have been if he had come to the conclusion that the tax element was to be wholly disregarded.

It is to be observed that Willmer J. was careful to confine his observations to the case before him where the claims were for "personal services" by the master and crew. In *Island Tug*

[1] [1958] 2 W.L.R. 256; [1958] 1 All E.R. 236.
[2] [1957] 1 All E.R. 72.
[3] [1956] A.C. 185.
[4] [1957] 1 All E.R. at p. 73.

& Barge, Ltd. v. *Owners of the S.S. Makedonia*[5] the services were rendered by a salvage vessel maintained on station for the express purpose of rendering salvage services and owned by a company whose principal business was that of professional salvors, but on this point Pilcher J. found it quite impossible to distinguish *The Telemachus*, and said[6]: "If the incidence of personal taxation is to be taken into account when the claimants are individuals who have actually taken part in this service, it is difficult to see why the same concession should not be made to the owner of a ship, where he is an individual, whose property has been put at risk if his ship has been instrumental in performing the service. If the principle applies to a ship owned by an individual, then why should the same concession be refused to a ship owned by a corporation? If it applies to a merchant ship owned by a corporation, then why should it not apply to a salvage ship similarly owned?"

Pilcher J., however, considered that he was not bound to follow the principle applied by Willmer J., for it was his view that the learned judge was wrong in taking into account, when he arrived at his award, the fact that the master and crew of the *Tantalus* would have to pay tax on the sums awarded to them. Pilcher J. recognised that one of the reasons for awarding salvage services on a liberal scale was to encourage mariners to assist vessels in distress, and that salvors might feel discouraged when they found that they had to pay tax on the profit element in the sum awarded to them. But it was not the business of the court to defeat or mitigate the effect of the fiscal laws of this or any other country more especially where that could only be done at the expense of the owners of the salved property.

It seems difficult to dissent from the view of Pilcher J. that this matter should be considered by Parliament if it is felt that salvors should be exempted in whole or in part from liability to tax, for, as he observed, the introduction of a tax element into salvage awards is both "startling and important." It is to be hoped that it will also be considered by the Law Reform Committee which was asked in 1957[7] to report on the law whereby the liability to tax of a person entitled to damages is required to be taken into account in assessing the damages, with particular reference to the decision in *British Transport Commission* v. *Gourley*.[8]

E. R. Hardy-Ivamy.

[5] *Supra*.
[6] p. 242.
[7] *Law Society's Gazette*, April, 1957, p. 205.
[8] [1956] A.C. 185.

A Matter of Pleading

We are so accustomed to thinking that the technicalities of pleading are no longer important that it may come as a surprise to learn that a party can still lose his case because his counsel has omitted a single letter " s " in a pleading.

In *Warner* v. *Sampson* [1] the plaintiff,[2] the landlord of a house, sued the defendant, the executrix [2] of a tenant who held under a ninety-nine-year lease commencing in 1900, for possession on the ground of non-payment of rent and breach of the repairing covenant. The defendant delivered a defence in which, after admitting that she was executrix, she denied any breach of covenant and concluded " Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed *seriatim*."

The plaintiff thereupon delivered a reply claiming that the defence disputed the landlord's title and exercising her right to forfeit the lease. The defendant sought leave to withdraw her defence, but Pearson J. varied the master's order giving such leave and permitted her to amend her defence but not to withdraw it.

At the hearing Ashworth J. held that the denial of title was clear and unambiguous and upheld the plaintiff's claim to forfeit the lease; the right of forfeiture accrued on delivery of the original defence and was not affected by the subsequent amendment. Counsel for the defendant [3] pointed out that the defence contained a denial of the breach of covenant, and argued that this amounted to an implied admission of the existence of the lease and of the covenants, but Ashworth J. relied on the fact that the general denial cited above excluded only one admission, which must be the admission that the defendant was executrix. " To give effect to the contention of counsel for the defendant," said the judge, " would involve adding the letter ' s ' to the word ' admission ' . . . or substituting some such expression as ' save as aforesaid.' "

He also rejected the argument that the denial of the lease was made by a mistake on the part of counsel, preferring to call it a lapse or mere forgetfulness. Admittedly counsel overlooked the possible consequence of a pleading in the form he drafted, but " there is nothing to show that counsel did not intend to draft the pleading in the form in which it was delivered, or that he was in any way misled."

In the result judgment was given for the plaintiff for possession of the house without any consideration by the judge of the merits

1 [1958] 2 W.L.R. 212; [1958] 1 All E.R. 44, Q.B.D.

2 For the purposes of this note I have ignored (a) the subsequent death of the plaintiff and the order to continue proceedings under Ord. 17, r. 4, and (b) the fact that the defendant was one of two executors.

3 The defendant's solicitor and counsel at the hearing were not acting at the time the defence was delivered.

of the case.[4] The defendant may not be the only one to ponder on the distinction between law and justice.

Aubrey L. Diamond.

Pavement Hazards

The case of *Macfarlane* v. *Gwalter* [1] raises once more the problem of liability for repair of the gratings, trap-doors, coal holes and cellar-heads which characterise the urban pavement.

The defendant was the occupier of premises adjacent to the highway, which included a cellar receiving its light through a grating set in the pavement. The condition of the grating became defective and consequently the plaintiff, a passer-by, was injured. In her particulars of claim, the plaintiff alleged nuisance at common law, and breach of statutory duty under section 35 of the Public Health Acts Amendment Act, 1890. The trial judge held that the grating formed part of the highway at the time of dedication; and, possibly for this reason, the claim at common law was not pursued in the Court of Appeal.

Section 35 (1) of the 1890 Act reads:

> "All vaults, arches, and cellars under any street, and all openings into such vaults, arches, or cellars in the surface of any street, and all cellar-heads, gratings, lights, and coal holes in the surface of any street, and all landings, flags or stones of the path or street supporting the same respectively, shall be kept in good condition and repair by the owners or occupiers of the same, or of houses or buildings to which the same respectively belong."

The court held that the defendant owed a duty under the statute to keep the grating in good repair, and that his failure to carry out this duty created a nuisance upon the highway, for which he was liable to the plaintiff.

The decision is not controversial, but two incidental comments may be made. Firstly, the use of the word nuisance is regrettable in that it leads to the type of verbal confusion which the court was most anxious to avoid in *Murfin* v. *United Steel Companies, Ltd.*[2] Statutory nuisance is a term which has even less claim to recognition than statutory negligence. It is submitted that the action should quite properly be classified simply as liability for breach of statutory duty. Secondly, it must be remembered that the Act of 1890 is not necessarily of universal application, but only

[4] Ashworth J. subsequently rejected a claim to relief from forfeiture under s. 146 of the Law of Property Act, 1925, on the ground that that section only applied to a right of forfeiture *under a proviso or stipulation in the lease*: [1958] 2 W.L.R. at p. 222; *Warner* v. *Sampson* (*No. 2*) [1958] 1 All E.R. 314.

[1] [1958] 1 W.L.R. 268; [1958] 1 All E.R. 181.

[2] [1957] 1 W.L.R. 104; [1957] 1 All E.R. 23.

extends to districts in which it has been adopted by the local authority.[3] If only for this reason it is still necessary to consider the question of liability at common law.

It may be convenient here to summarise the present position:

1. The immunity of the highway authority for nonfeasance in respect of the ordinary surface of the pavement remains unimpaired.
2. At common law, the adjacent occupier owes no duty to repair fixed objects which formed part of the pavement at the time of dedication.[4] These become part of the highway and are therefore the responsibility of the highway authority, which, of course, will only be liable for misfeasance. But it is submitted that the adjacent occupier is liable for the disrepair of any movable parts used specifically for the benefit of his premises, *e.g.*, coal-hole covers and publicans' trap-doors.[4]
3. Even in the case of fixed gratings, the adjacent occupier will be liable in nuisance for disrepair if the grating was placed in the highway after the date of dedication.[5]
4. In a district where the Public Health Acts Amendment Act of 1890 has been adopted, the adjacent occupier owes a duty under section 35 to repair all cellar-heads, gratings, lights and coal holes which "belong" to his premises. It makes no difference here whether the object was placed in the pavement before or after the date of dedication.[6]

Obviously this simplicity is lost in cases where the injury is caused not by a defect in the pavement itself, nor by a defect in the grating, etc., itself, but rather by the inter-relation of the two. The common example of this is the variation of levels caused by the grating projecting above or sinking below the level of the surrounding pavement:

1. Where such variation is caused by the misfeasance of either the highway authority or the adjacent occupier, then it seems that the party thus in default will be liable.[7]
2. Where the variation is caused by the nonfeasance of both parties:

[3] The Act may be adopted by all urban authorities, and by Rural District Councils with the consent of the County Council. (Ss. 2 and 3, as extended by the Rural District Councils (Urban Powers) Order, 1931.)

[4] *Robbins* v. *Jones* (1863) 15 C.B.(N.S.) 221.

[5] See also the Town Improvement Clauses Act, 1847, s. 73, and the Town Police Clauses Act, 1847, s. 28.

[6] *Macfarlane* v. *Gwalter*, *ante*.

[7] This view finds some support in *Penney* v. *Berry* [1955] 3 All E.R. 182, at p. 184 F.

(a) If the Act of 1890 applies, then section 35 seems wide enough to render the adjacent occupier liable.[8]

(b) At common law, if the object existed in the pavement at the time of dedication, then it will form part of the highway and accordingly there will be no liability at all.[9]

(c) The remaining possibility at common law is where the object was placed in the pavement after the date of dedication. This, however, is the point at which authority gives way to speculation.

T. G. Ison.

Clean Bills of Lading

On November 6, 1957, Midland Bank Ltd. (hereinafter called "the bank") received a cable from Arab Bank Ltd. It requested them to open an irrevocable credit for £23,000 in favour of British Imex Industries Ltd. ("the sellers") on behalf of Hamzeh Malas and Sons, a Jordanian firm ("the buyers"), in respect of the sale of steel rods. On the same day the bank wrote to the sellers informing them of the irrevocable credit. One week later, on November 13, the bank wrote again stating that the credit was now confirmed by them in the following terms: "We hereby undertake to honour all drafts on presentation provided they are drawn and presented in accordance with the terms of the credit. It is a condition of this amendment that our confirmation commission amounting to £18 is for your account."

The sellers duly paid that commission and, on November 27, 1957, the goods were shipped. The sellers presented the shipping documents to the bank on December 5 but these were rejected. Revised documents were prepared but the buyers, dissatisfied with an earlier shipment of steel rods received from the sellers, issued a writ against the sellers claiming damages for breach of contract on December 9, and on the same day secured from Donovan J. on an *ex parte* application an interim interlocutory injunction restraining the sellers from drawing on the letter of credit. On the morning of December 10, Donovan J. in chambers refused to continue the injunction and later the same day the Court of Appeal upheld the judge's decision.[1] Thereupon, on December 10 (the last day of validity of the confirmed irrevocable credit) the revised documents were presented to the bank.

[8] It is submitted that the spurious argument to the contrary in *Penney* v. *Berry* is quite untenable.

[9] This follows from *Robbins* v. *Jones* (*ante*).

[1] *Hamzeh Malas & Sons* v. *British Imex Industries, Ltd.* [1958] 2 W.L.R. 100; [1958] 1 All E.R. 262, C.A.

The bank, no doubt aware of the dispute that had arisen, refused to pay the sellers on a ground to be discussed below. On the following day, therefore, December 11, the sellers issued a writ against the bank claiming payment of £21,468 0s. 8d. under the credit. The action came on for hearing before Salmon J. in the Commercial Court on December 19, and judgment was given for the sellers on December 20, nine days (*pace* Salmon J.) after the commencement of the action.[2] "This case illustrates very well," said Salmon J., "the speed and convenience with which the commercial community can have its disputes determined in this court when it chooses to resort to it."

The bank refused to pay the credit on the ground that the bills of lading were not in order. It is of course well established that the utmost care must be taken by the bank before paying: they can only secure repayment from the issuing bank "if the conditions on which [they are] authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well."[3]

In this case the back of the bills of lading bore, in very small type, the conditions of carriage. Clause B, which dealt with the consignment of iron and steel, required each piece to be distinctly and permanently marked with oil paint and each bundle to be similarly marked, securely fastened, and metal tagged. Unless these requirements were complied with, the vessel was not to be responsible for correct delivery. The bank pointed out that the bills of lading bore no indorsement confirming that these requirements had been complied with and therefore alleged that the bills were not "clean" bills of lading.

The sellers countered with three arguments: first, that the letter of credit stipulated that payment would be made against "bills of lading" and that this did not necessarily mean "clean" bills of lading; secondly, that, even if clean bills were necessary, these bills were sufficient since they bore no indorsement showing that clause B had *not* been complied with; and thirdly, that clause B was void, being inconsistent with the Hague Rules.

As to the first point, the position hitherto has been stated as follows: "Whether, without a specific requirement, the seller is bound to tender a 'clean' bill of lading must be regarded as an open question depending on all the circumstances of the particular case."[4] Although Bailhache J. in *National Bank of Egypt* v. *Hannevig's Bank Ltd.* expressed the view that a clean bill of lading

[2] *British Imex Industries, Ltd.* v. *Midland Bank, Ltd.* [1958] 2 W.L.R. 103; [1958] 1 All E.R. 264. The quotation is at p. 106 (W.L.R.); p. 267 (All E.R.).

[3] *Equitable Trust Company of New York* v. *Dawson Partners, Ltd.* (1927) 27 Ll.L.Rep. 49, H.L., *per* Lord Sumner at p. 52.

[4] A. G. Davis, *The Law Relating to Commercial Letters of Credit*, 2nd ed., p. 130. Professor Davis suggests that the letter of credit should clearly state whether clean bills are required so as to avoid disputes: *ibid.*, p. 133.

was necessary, all three members of the Court of Appeal in that case expressed doubts as to the correctness of his decision, but without finding it necessary to decide the point.[5] Salmon J., however, agreed with Bailhache J. and held that "when a credit calls for bills of lading, in normal circumstances it means clean bills of lading." "No doubt," he went on, explaining the doubts felt by the Court of Appeal in the *National Bank of Egypt* case, ". . . there may be circumstances when, for instance, business has been disorganised by war, in which a credit against bills of lading is not necessarily a credit against clean bills of lading."[6] But it was not necessary to decide that point, for here there were no special circumstances.

The second point turned on the meaning of the common expression "clean bill of lading." "A 'clean bill of lading'," said the judge, "has never been exhaustively defined, and I certainly do not propose to attempt that task now. I incline to the view, however, that a clean bill of lading is one that does not contain any reservation as to the apparent good order or condition of the goods or the packing."[7] The bills in the instant case described the goods as "in apparent good order and condition," and were not "claused" by any statement indorsed on the bill qualifying that description; they were, therefore, clean bills of lading.[8]

The importance of this part of the decision lies not in the definition offered by the judge, but in his rejection of the bank's argument that "it was their duty for the remuneration of £18 to read through the multifarious clauses in minute print on the back of these bills of lading, and having observed . . . clause B, to consider its legal effect and then to call for an acknowledgment that there has been compliance with it." Salmon J. commented: "I doubt whether they are under any greater duty to their correspondents than to satisfy themselves that the correct documents are presented to them, and that the bills of lading bear no indorsement or clausing by the shipowners or shippers which could reasonably mean that there was, or might be, some defect in the goods, or their packing."[9]

[5] (1919) 1 Ll.L.Rep. 69, *per* Bankes L.J. at p. 70; Scrutton and Duke L.JJ. at p. 72. Also reported in 3 *Legal Decisions Affecting Bankers*, at p. 213.

[6] [1958] 2 W.L.R. at p. 107; [1958] 1 All E.R. at p. 268.

[7] *Ibid.*

[8] In *Restitution Steamship Co.* v. *Sir John Pirie & Co.* (1889) 61 L.T. 330, at p. 333, Cave J. said: ". . . a clean bill of lading is a bill of lading which contains nothing in the margin qualifying the words in the bill of lading itself. . . ." *Cf.* Channell J. in *Compania Naviera Vasconzada* v. *Churchill & Sim* [1906] 1 K.B. 237, at p. 247. The English and American authorities are collected in "What is a 'Clean' Bill of Lading?—A Problem in Financing International Trade" by Daniel C. Draper (1951) 37 Cornell L.Q. 56. See also A. G. Davis, *op. cit.*, p. 130, n. 1.

[9] [1958] 2 W.L.R. at p. 108; [1958] 1 All E.R. at p. 269. This agrees with the view expressed *obiter* by Scrutton L.J. in *National Bank of Egypt* v. *Hannevig's Bank, Ltd.* (1919), as reported only in 3 *Legal Decisions Affecting Bankers*, at p. 214.

It is perhaps unusual for a bank to attempt to convince the court that it is under an obligation more stringent than that alleged by the other party. Had the court accepted the bank's contentions as to the extent of its duties, some qualification in the terms of future letters of credit would no doubt have been necessary for the protection of banks. Salmon J.'s decision may therefore be welcomed as being in accordance with both common practice and common sense.

The judgment of the Court of Appeal in refusing the buyers an injunction against the sellers also recognised the importance of the practice of the banker's commercial credit. As Jenkins L.J. said: " . . . it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment, it would be wrong for this court in the present case to interfere with that established practice." [10] Despite the fact that the buyers were seeking an injunction against the sellers, treating the letter of credit as no more than part of the price, and not against the bank, the application was refused.[11]

Finally, to complete the account of the action against the bank, it must be mentioned that Salmon J. agreed with the sellers on their third argument too, and held that clause B went further than Article IV, rule 2, of the Hague Rules.[12] That being so, it was, in so far as it went beyond that rule, void.[13]

Aubrey L. Diamond.

Employer Responsibility For Safe Tools

Davie v. *New Merton Board Mills, Ltd.*[1] is a case of remarkable interest and considerable importance. It involved the scope of employer responsibility at common law for injuries sustained by

[10] *Hamzeh Malas & Sons* v. *British Imex Industries, Ltd.* [1958] 2 W.L.R. 100, 102; [1958] 1 All E.R. 262, 263.

[11] Both Jenkins and Sellers L.JJ. thought that there was no lack of jurisdiction to grant an injunction in an appropriate case, as, for example, where there was fraud.

[12] Enacted in the Carriage of Goods by Sea Act, 1924, s. 1, and Sched., providing that " Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (*n*) Insufficiency of packing; (*o*) Insufficiency or inadequacy of marks."

[13] Art. III, r. 8: " Any clause . . . in a contract of carriage relieving the carrier or the ship from liability for loss or damage to . . . goods arising from negligence, fault or failure in the duties and obligations provided in this Article, or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."

[1] [1958] 2 W.L.R. 21; also reported in [1958] 1 All E.R. 67.

workmen in their employment. The workman in this case was injured when knocking out a metal key by means of a steel "drift" and hammer. The drift had been badly manufactured, being made of a steel that was excessively hard and consequently liable to fracture when struck in the normal way with a hammer. In this case it splintered off into the plaintiff's eye. On the evidence it was held that the manufacturer had been guilty of negligence in making the drift. The defendant's employer had purchased the tool ready-made not directly from the manufacturer but through a firm of reputable middlemen. Was the employer liable to pay damages for breach of the common law duty to take reasonable care to provide his workmen with "proper appliances," here, sound tools?

The fact that, since *Donoghue* v. *Stevenson*, the manufacturer is clearly liable in damages to the injured man does not make the question entirely an academic one.[2] The employer is at hand, known to the workman, covered by private insurance; the manufacturer is remote, unknown to the workman, may be insolvent, may or may not be insured, may even be, as Pearce L.J. pointed out for another purpose, a company that has ceased to exist.[3] So, is the employer responsible? The Court of Appeal held, by a majority of two to one, that he is not.

At common law, the employer must take reasonable care for the safety and health of his workpeople. Out of this general duty have crystallised a number of specific duties including the duty to provide safe premises and the duty to provide proper appliances. It is well established that this duty to take reasonable care contains a large element of strict liability. If an employer employs a contractor to build or repair for him a factory or power station or other industrial or business premises, the employer as well as the contractor himself is legally responsible for the latter's negligent work, even though the employer took every care to engage a highly competent and reputable contractor and whether or not the employer was able to check the quality of the work when completed. A workman of the employer who is injured through a defect in the contractor's work will have his common law remedy for compensatory damages as well as his claim for subsistence benefit under the National Insurance (Industrial Injuries) Acts. The damages for breach of the employer's "personal" duty will be met by the employer's insurance company, the premiums forming part of business overheads, and the fault (if any) of the employer may be reflected in the future terms of the insurance policy. At the same time, the individual solely or principally at fault may be reached through third-party proceedings in tort. This is a scheme of things, combining the principle of social security with that of individual

[2] *Pace* Parker L.J., at p. 47.
[3] At p. 50.

responsibility for individual fault, that is, in my respectful opinion, a just, if complicated one, fully recognising, in the sphere of employment, the "inevitable accidents" of a highly geared industrial society.

However, in *Davie's* case, it was the provision of proper appliances, not safe premises, that was at issue. If a manufacturer is engaged to make tools to the employer's specification, the situation is plainly identical with that of the contractor to build or repair premises. But, if the employer obtains his tools ready-made from the manufacturer directly or through a middleman, the employer may then be said to deal not with an independent contractor but with an independent supplier.

Jenkins L.J., the dissentient in *Davie's* case, after a convincing analysis of the authorities, concluded, albeit reluctantly,[4] that the distinction between contractor and supplier is without legal difference, that the employer's duty "is an absolute duty to take reasonable care which can be discharged only by showing that all reasonable care has in fact been taken to ensure the soundness of the tools provided, and not by showing that the employer entrusted to somebody else the taking of all reasonable care, or assumed that somebody else had taken all reasonable care, to ensure the soundness of those tools."[5] Later, the learned judge added: "The duty remains a duty of reasonable care, but the obligation to take that degree of care *per se* or *per alios* is an absolute obligation."[6]

This, in my respectful opinion, is a true evaluation of the preceding English and Scottish authorities. The statements of the House of Lords in *Wilsons and Clyde Coal Co., Ltd.* v. *English*[7] amount to this; so, preponderantly, do the statements of the Court of Session in *Bain* v. *Fife Coal Co.*[8] and *Macdonald* v. *Wylie*[9]; so does the decision of Goddard L.J. (as he then was) in *Paine* v. *Colne Valley Electricity Supply, Ltd.*[10]; and so too does the decision of the Court of Session in *Donnelly* v. *Glasgow Corporation.*[11]

However, the majority in *Davie's* case saw fit to draw a line between obtaining a tool to specification from a contracting manufacturer and obtaining a tool ready-made from a middleman supplier. On the question whether it would have made any difference had the ready-made tool been procured direct from the manufacturer, the judgments of the majority are impossibly difficult to fathom.[12]

4 At p. 40. 5 At p. 38.
6 At p. 40.
7 [1938] A.C. 57.
8 1935 S.C. 681.
9 (1898) 1 Fraser (Ct. of Sess.) 339.
10 [1938] 4 All E.R. 803.
11 1953 S.C. 107.
12 At p. 42 (*semble*, would not make a difference); at p. 47 (*semble*, *would* make a difference); at p. 50 (impliedly, *would* make a difference); and at p. 51 (leaves question in the air).

Be this as it may, Parker and Pearce L.JJ. found they could not construe the statements of the House of Lords or the Scottish courts to cover the purchase of ready-made tools. In such a case, the employer was not personally responsible for the negligence of the manufacturer but responsible only for the personal negligence of himself or his servants: "if the defendant purchased the tool from suppliers or manufacturers whom they had reason to believe were unreliable, or if the defect was patent to the defendants or one which they ought to have suspected, the position might be different." [13] Another reason Parker L.J. adduced for rejecting the claim was that, "such a duty would be one incapable of performance in that the master would have no control over the processes of the ultimate manufacturer." [14] But, what control has an employer over the work of his independent contractors? If, on the other hand, "control" refers to right of legal redress, the employer, though not in contractual relations with the manufacturer, still has a right of indemnity in tort against him. With respect, this particular reason is utterly mystifying.

Again, Pearce L.J. employed two contributory arguments to support the view of the majority, neither of which is, with respect, at all convincing. One was a reference to the adverse consequences of following Jenkins L.J. in an unlikely and extreme hypothetical case: "Such a concept would presumably make an employer liable if he bought a factory which through the negligence of the original builder years before had a defect (undiscoverable by reasonable examination when once the building was completed) which subsequently harmed his employee." [15] It must be observed that there is little connection between this situation and the acquisition of goods, and it might also be observed that, from the viewpoint of the social security principle, the building case is precisely the kind in which responsibility should be fastened on the employer (and his insurance company).

The other argument of Pearce L.J. was that the employer's duty was to "provide" proper appliances, not "make" them.[16] This suggested distinction is, with respect, quite astonishing, in view of the settled rule that reasonable care in providing safe premises refers to and includes reasonable care in building or repairing them. Similarly, reasonable care in providing proper appliances clearly refers to and includes reasonable care in making or procuring them.

It should be added that only slight weight was accorded by the majority to the decision of Finnemore J. in *Mason* v. *Williams*,[17] that an employer is not responsible for the negligence of a reputable

[13] At p. 42.
[14] *Ibid.*
[15] At p. 50.
[16] At p. 48.
[17] [1955] 1 W.L.R. 549: referred to at p. 43.

manufacturer from whom he had bought a ready-made but defective tool. This attitude to *Mason's* case was only right, seeing that Finnemore J. gave his view of the law on this very important matter without the citation of cases by counsel, without reference to any cases in the judgment, *tout court* without any attempt at reasoned justification.

Finally, it should be noted that Parker L.J. expressed the belief that if they were to impose liability on the employer "it would be a retrograde step towards the theory of liability without negligence," [18] a statement which should probably be taken as a serious indication that the principle of social security in the law of torts relating to industrial injuries no longer finds favour with a section of the judiciary.

Leave to appeal was granted. A decision of the House of Lords on this issue would be most desirable. It remains to be seen whether the House of Lords will approve limiting the responsibility of employers (and their insurance companies) along the line drawn between tools made by a manufacturer to the order of the employer and tools bought by the employer ready-made: a line described by Jenkins L.J., with little exaggeration, as "an irrational and intolerable refinement." [19]

C. Grünfeld.

Companies Owning Their Own Shares

Re Castiglione's Will Trust [1] again raises the problem of a company owning its own shares. Since the case of *Trevor* v. *Whitworth* [2] it has been clear law in England that a company cannot *purchase* its own shares or in any way become a member of itself. The expressed reason is that this would amount to a reduction of capital impliedly prohibited by the Companies Acts. This may be a valid reason but it is not an explanation of policy. Why do the Companies Acts prohibit the reduction of capital? The explanation, plainly, is because it is believed, rightly or wrongly, that maintenance of the capital yardstick is an essential protection to the creditors of a limited liability company. Hence on the introduction of redeemable preference shares provisions were inserted in the Act securing the maintenance of the pre-existing nominal capital through the institution of a capital redemption reserve fund.[3]

The arguments in favour of this rule are clearly strongest when the company actually purchases [4] its own shares, for then there

[18] At p. 43.
[19] At p. 40.
[1] [1958] 2 W.L.R. 400; [1958] 1 All E.R. 480.
[2] (1887) 12 App.Cas. 409, H.L.
[3] Companies Act, 1948, s. 58.
[4] Or gives the former holder some benefit such as a release of the uncalled liability. *Bellerby* v. *Rowland & Marwood S.S. Co.* [1902] 2 Ch. 14.

is a return of capital to shareholders. Moreover, in such a case there are additional practical objections probably of greater moment than the rather doctrinaire objections to reduction of capital as such. If the company traffics in its own shares it is likely to result either in a "watering" of the value of the remaining shares (if the price paid is too high) or in an increase of the value of remaining shares if the price paid is too low. The latter alternative, though prima facie unobjectionable, has undesirable overtones because it will often mean that the directors of the company are taking advantage of their inside information to increase the value of their own holdings—and doing so by using the company's money, not their own.

None of these objections applies when the company *voluntarily* acquires its own shares. Nevertheless it is clear that it cannot legally do this if the shares are actually transferred to it and thereby disappear. This is a reduction of capital which is forbidden. But is it permissible for the shares to be voluntarily transferred to trustees for the company? There is then no trafficking in the company's shares. This being so it was held in *Kirby* v. *Wilkins*[5] that there was no legal objection to this course, and this decision has now been followed by Danckwerts J. in *Re Castiglione's Will Trust*.[6]

Notwithstanding these two decisions it is submitted that there are in reality potent reasons why this should be forbidden. First, it is surely objectionable that a company should be allowed to control the votes of its own shares? This, indeed, is fully recognised in the U.S.A. There, in general, a purchase by a company of its own shares is permitted, but "treasury shares," as they are called, cannot be voted. In other words the U.S.A. recognises (rightly it is thought) that the voting objection is the most serious objection of all. It was the effects on voting power which led to *Kirby* v. *Wilkins* and it caused the learned judge (Romer J.) some concern. He decided, however, that English law recognised no objection. The judgment in *Re Castiglione's Will Trust* contains no suggestion that there might be anything undesirable in voting the shares. The only concern of the learned judge was to ensure that the trustees of the shares should be existing members of the private company.

It seems, therefore, that the device which has now been recognised could be used to separate ownership and control even more effectively than non-voting ordinary shares. It is unlikely that much use will ever be made of the device in the case of public companies; it is in the case of private ones that it is more likely to be adopted. Suppose a controlling shareholder of a private company wishes the other members of his family who are shareholders to "own" the company but to have no "control" over its directors. He can accomplish this by leaving his controlling

[5] [1929] 2 Ch. 444.

[6] *Supra*, n. 1. Simmonds J. in *Re Buckingham* (1943) 170 L.T. 53 had expressed certain doubts.

shares on trust for the company. The directors will then be free from any outside control except that flowing from their fiduciary duties and from such remedies as section 210 of the Companies Act and the investigatory powers of the Board of Trade.

More serious, perhaps, is the possibility of using this device for tax evasion purposes. The "Chancellor's Umbrella," which has hitherto protected "controlled" companies from the likelihood of a surtax direction if they do not distribute a reasonable amount of their profits,[7] has now been removed,[8] and surtax directions are likely to play a more important role than they have since before the War. But cannot a coach-and-horses now be driven through the statutory provisions? A and B own all the 1,000 shares of a private company. They create a trust of 998 shares in favour of the company merely retaining one share each. Thereafter the company distributes all its profits by way of dividend. All but one five-hundredth of the profits will be repaid to the company and, in effect, ploughed back. But how can a surtax direction be made? The company has "distributed" by way of dividend all that it is entitled to do.[9]

The full implications of this device do not yet seem to have been thought out. It may be a matter that will require attention from the next Company Law Amendment Committee.

L. C. B. G.

Divorces, Matrimonial Homes and Injunctions

The recent Court of Appeal decision on the interlocutory motion in *Gorulnick* v. *Gorulnick* [1] concerned the question that we have seen cropping up so many times in recent years—the right to occupy the matrimonial home. The plaintiff had filed a petition last September claiming a divorce for her husband's cruelty; the defendant had denied it; and the wife then asked the court to restrain him from living or remaining in the matrimonial home. Let us take a look at each ground of her claim and the reasons of the court [2] for refusing to grant the injunction.

7 Under Income Tax Act, 1952, ss. 245 *et seq.*

8 Hansard, 1957, Vol. 574, Col. 225 (written answers).

9 While profits tax remains weighted against distributed profits the obvious danger is that after a time a heavy profits tax liability will be incurred. The annual profits will increase in geometrical progression and *semble* the repaid dividends could not be regarded as franked investment income so as to escape profits tax. Once the annual profits become sizable it would be well to wind up the company and start again with a new one. (Presumably on a winding up the individual shareholders will take all the assets?) However, if the proposals in the 1958 Budget are put into operation the distinction between distributed and undistributed profits tax will disappear.

1 [1958] P. 47: also reported at [1958] 2 W.L.R. 58; [1958] 1 All E.R. 146.

2 Hodson and Morris L.JJ.

It was, of course, entirely within the discretion of the trial judge [3] whether he would grant the injunction or not. His refusal naturally goaded the wife into an appeal—not on the ground that he had taken any wrong factors into account, but rather that he had simply exercised his discretion in the wrong way. Her counsel put these arguments to the court:

First, that the home was *her* property and that section 12 of the Married Women's Property Act of 1882 gave her the right to protect and secure it against her husband. But counsel did not press this point, and neither judge was willing to base his judgment on that section.[4] As *Shipman* v. *Shipman* [5] had shown quite convincingly, the section did not give her the right to treat her husband as if he were a stranger—at least so far as the matrimonial home was concerned—and so, for practical purposes, the discretion given both by section 17 [6] and by the practice of the Divorce Court in such a case [7] could be brought into play. Happily, therefore, the court did not have the frighteningly antiquated task of having to apply strict legal rights to an intimate domestic situation.

Secondly, she wanted her husband out of the house because she was afraid of him. Her petition, it should be emphasised, was based on cruelty, and she had medical evidence to show that her present state of health *might fairly* be attributed to the cruelty she alleged. But, of course, her husband had denied it, and since the question could not be decided until the petition was heard, the court now preferred to push it into the background. In no case cited to them, they said,[8] had a court ejected a husband who had been living in the house *up to the making of the application*: where, on the other hand, he had *left* his wife and *then* "attempted to return in order to put himself in a position in which he is or may be thought to be wrongly disturbing the status quo," [9] the court had the right to keep him out. Are we to believe, then, that a husband may be cruel to his wife, refuse to leave her house, refuse to let her leave, and then, when she petitions for a divorce from him, get the sanctimonious blessing of the court to stay in her house and torment her? Admittedly, the husband's cruelty and the likelihood of his using "persuasion" to make his wife drop her suit were not proved in

[3] Wallington J.

[4] See *per* Hodson L.J. at pp. 50–51; *per* Morris L.J. at p. 53.

[5] [1924] 2 Ch. 140.

[6] The discretion can be exercised even in a suit not brought expressly under it: see *Bashall* v. *Bashall* (1894) *The Times*, November 21 (affirmed on a different point (1894) 11 T.L.R. 152). Approved by the Canadian Supreme Court in *Minaker* v. *Minaker* [1949] 1 D.L.R. 801, 805, 809. *Cf. per* Birkett L.J. in *Woodcock* v. *Hobbs* [1955] 1 All E.R. 445, 450, and for an application under s. 17 in circumstances similar to the present, see *Stewart* v. *Stewart* [1948] 1 K.B. 507.

[7] *Willmott* v. *Willmott* [1921] P. 143, 145, *per* Hill J.

[8] See *per* Hodson L.J. at p. 51.

[9] At p. 51. See *Teakle* v. *Teakle* (1955) 66 T.L.R. (Pt. 2) 588; *Silverstone* v. *Silverstone* [1953] P. 174.

this case [10]—but why should not a court think it worth while to provide against the *possibility* that these claims were true? [11] After all, the spouses' relationship *had* sunk to the level of litigation, the wife *had* vowed never to live with her husband again whether or not she got her divorce, and there *was* the possibility that the divorce might be granted—so was it not really a disregard of the potentialities of the situation to refuse the wife the right to live her life privately, at least until the trial, free from the possibility of interruption and coercion by her husband?

Thirdly, indeed, pushing this line of argument even further, the refusal would most probably have the effect to which Hodson L.J. alludes in his judgment [12]—that of forcing the wife to *leave* her home until the petition was heard. Hodson L.J. did not "think it right to arrive at that conclusion"—but if the wife had vowed never to live with her husband again, it is difficult to see what else could happen! If she had waited until fear and ill-health had driven her away and then sought the injunction, she would have been in a position very similar to that of the plaintiff wife in *Boyt* v. *Boyt*.[13] The court put *her* back into her home and excluded her husband, despite the fact that her allegation of cruelty was unproved and denied by him, clearly foreseeing the possibility that he *might* interfere with the prosecution of her petition.[14]

Finally, a lame argument that the court did not even feel inclined to give page space in its judgments. If the wife had to keep on living with her husband there was the possibility that he might raise this seeming condonation of his cruelty as a bar to her petition. Of course he might—but as the essence of condonation is that the injured party should receive the other back *voluntarily* and forgive him his previous abuse of the marriage, the Divorce Court could hardly consider the Court of Appeal's virtual compulsion to cohabit as indicating this.

A strange situation. Admittedly the couple had the duty to live together as long as they could and until one gave the other some excuse for leaving. But where their relations have sunk to the pitch of litigation, no court will help the course of reconciliation by trying to force the wife to take her husband back against her wishes.[15] If there is any reconciling to be done, they will do it

[10] And in not *all* the cases cited here has the cruelty been substantiated more than by a denied allegation.

[11] Could not evidence of the possibility of "persuasion" at least have been introduced without usurping the duties of the Divorce Court?

[12] At pp. 51–52.

[13] [1948] 2 All E.R. 436.

[14] Though there was here the additional fact of the children's welfare to be considered. Since the court wanted the custody to go to the wife, it also allowed her to move back to their home for their sakes.

[15] Only once does either of the judges mention the question of reconciliation: see Hodson L.J. at p. 51. Clearly, if this is what they had in mind, the result outlined in the third argument above would seem to point out the futility of the course they chose.

themselves, whether they are living together or a hundred miles apart.

Alan Milner.

The Homicide Act, 1957, and Diminished Responsibility—an Abdication of Responsibility?

When Parliament last year introduced into the English law of homicide the doctrine of diminished responsibility, which had been accepted in the Scottish courts in the nineteenth century, it was clear that certain questions would have to be answered concerning the exact scope and effect of the doctrine. The first year of the working of the Homicide Act, 1957, has produced some clarification, and on the whole the doctrine has been applied with discrimination and has worked reasonably well. The case of *R.* v. *Spriggs*,[1] however, shows that the judges are disposed to leave the jury almost complete discretion in such cases, even where there is a sharp difference of opinion over the meaning of the section, and it is submitted that this leaves the matter in a rather unsatisfactory state.[2]

The case concerned the murder of a barman of a public-house by one of the customers, a young man of twenty-nine, who had earlier in the evening been caught by this barman leaving the premises with an advertisement sign under his arm which he had wrongfully taken. The barman had ejected him onto the car park, and when later the same evening he went to the door in answer to a knock, the barman was shot several times by Spriggs, and died immediately from his wounds. The next morning police officers found Spriggs at home suffering from an overdose of drugs. He admitted the killing.

At the trial at Birmingham Assizes, Spriggs was found guilty of capital murder and sentenced to death. The defence had contended that he was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957.[3] There was medical evidence to show that the accused had suffered from a lack of ability to control his emotions, and Lord Goddard C.J. in the Court of Criminal Appeal observed that he " certainly had a history

[1] [1958] 2 W.L.R. 162. Also reported in [1958] 1 All E.R. 300.

[2] The case of *R.* v. *Matheson* [1958] 1 W.L.R. 474, shows that the Court of Criminal Appeal will quash a conviction for murder and substitute a verdict of manslaughter where in its opinion the verdict of the jury could not be supported having regard to the evidence. This decision qualifies the effect of *R.* v. *Spriggs* somewhat, and may be reviewed in a subsequent number of this journal.

[3] Homicide Act, 1957, s. 2 (1). " Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

showing that he was of a somewhat unstable character." The prosecution had contended at the trial that " abnormality of mind " in section 2 (1) of the Homicide Act, 1957, was limited to deficiency in intellect and could not include the various types of mental condition from which the accused had suffered for a long time, that the appellant had a high intelligence quotient and could not therefore be suffering from abnormality of mind. The defence had argued that the section was wide enough to cover unstable persons like the accused.

The trial judge in summing up on this question gave the jury a copy of the section to look at, and told them it was for them to decide whether or not the accused suffered from such an abnormality of mind as substantially to impair his mental responsibility. To enable them to come to their decision he went meticulously and carefully through the evidence given on one side and the other. The basis of the appeal was that he did not give a sufficient direction as to the meaning of the expression " abnormality of mind " or " mental responsibility," and did not give the jury sufficient guidance concerning the mental states which fell within the section, especially in view of the prosecution's contention that the section bore a limited meaning, and was confined to cases of deficiency of intelligence. Where there were rival interpretations of the meaning of the section, it was incumbent on the judge to give the jury guidance. They should have been told that the function of the mind was not limited to intelligence, that the mind was also the seat of the emotions, and that it was not for them to draw a distinction between intelligence and emotion but simply to decide the degree of impairment of mental responsibility.

Lord Goddard in the course of argument pointed out that the doctrine of diminished responsibility had been borrowed from the law of Scotland, where the judges had always found it a difficult matter to explain to the jury. In his judgment on behalf of the Court of Criminal Appeal, Hilbery and Salmon JJ. concurring, the Lord Chief Justice observed that the trial judge was quite right to leave the question to the jury, because there was evidence which might have justified the jury in finding that this was a case of diminished responsibility. " But the evidence was not such as to compel the jury to find that way; there was evidence on the other side and we cannot see that a judge dealing with this matter can do more than call the attention of the jury to the exact terms of the section which Parliament has enacted and leave them to say whether upon the evidence they are satisfied that the case comes within the section or not. When Parliament has defined a particular state of things, as they have defined here what is to amount to diminished responsibility, it is not for the judges to re-define or attempt to re-define the definition. The definition has been laid down by Parliament and it is a question then for the jury. It is a question of fact in any particular case as to whether the jury

find that the defendant's evidence brings him within the section or whether it does not."

His Lordship cited the judgment of Lord Cooper in *H.M. Advocate* v. *Braithwaite*[4] as an example of the difficulties experienced with the doctrine in Scotland. He noted that the Lord Justice-Clerk did not go into nice distinctions between mind and emotion or intellect and emotion, and that "one has to remember after all that juries are not drawn from university professors or university dons. They are ordinary men and women, and would it not only be confusing them if one went into metaphysical and philosophical distinctions between what is emotion and what is intellect and matters of that sort?" It was held that there had been no misdirection by the trial judge, and the appeal was dismissed. Subsequently the capital sentence was commuted.

The question arises whether this decision involves an abdication of responsibility on the part of the judges in interpreting and developing this new defence of diminished responsibility. It would seem that in future, rather than sort out the difficult issues concerning emotional instability and psychopathic personality and criminal responsibility, and help the jury to reach a sensible decision, the trial judge must withdraw from the discussion, fold hands, quote the section, and leave it to the jury. The consequence will be that the jury will be cast adrift "in a shoreless starless sea" at the mercy of conflicting views concerning the scope of the new defence, and without any authoritative interpretation or guidance from the judge. Admittedly juries are not drawn from the ranks of university professors or dons (heaven forbid) but it is submitted that it is precisely because they are not so constituted that they need guidance, and it is essential to give them a reasoned and simple explanation of the law. If the judge is not going to do this, will it be left to the prosecution to advance its own interpretation? After this case, will it be open to the prosecuting counsel to put forward a limited view of the scope of the defence of diminished responsibility? Probably not. The duty of the prosecution should surely not go further than that of the judge, and extend to defining or re-defining the section. If in future the judge and the prosecution abstain from making their own observations, are the jury to be left at the mercy of the defence counsel and his interpretation? If this extreme is rejected, then either the prosecution must be free to put forward a semi-official and unauthorised view of the scope of the defence, or the judge must assume again the responsibility which this decision appears to require him to surrender. It is to be hoped that eventually wiser counsels will prevail, and proper guidance will be forthcoming from the bench concerning the meaning of the section. This unprecedented and wholly unwarranted abdication of responsibility should be reversed.

J. E. Hall Williams.

[4] (1945) S.C.J. 55.

CORRESPONDENCE

The Editor,
The Modern Law Review.

January 29, 1958.

Sir,

Although I read the article by Mr. N. Simon Tessy: "Is a Discretion Statement Necessary" in your January issue with considerable interest, I feel that his conclusions may not be sound.

He says "Such a statement (a discretion statement) if it ever did serve a useful purpose does not do so now." This may be true where the only issue at stake is whether or not a "discretionary decree" for dissolution should be pronounced. In a great number of suits, however, the discretion statement becomes important after the decree is made absolute.

For instance, in an undefended suit for dissolution brought by the wife who requires the exercise of the court's discretion, the husband can obtain access to the discretion statement on her application for maintenance notwithstanding that he has not defended the proceedings, providing, of course, he has entered an appearance (*per* Barnard J. confirming a Registrar's decision in *L.* v. *L.* unreported). The contents of the discretion statement can then be relied on by the husband as evidence in support of a submission that the conduct of the wife was such that the provision to which she might have been entitled should be reduced (*J.* v. *J.* [1955] P. 215 and *Duchesne* v. *Duchesne* [1951] P. 101).

It would appear that in such a suit the discretion statement does serve a useful purpose as it brings to light, in a readily accessible form, matters which in a great number of suits go to the really important issue at stake. If the courts cease requiring a full and honest discretionary statement before they grant a discretionary decree a party might be deprived of valuable evidence at a later stage.

The protection afforded to the statement by the sealed envelope appears greater than the alternative which might require that the party seeking discretion should in maintenance proceedings be put to proof on affidavit whether he or she was not guilty of such conduct as is contemplated by say section 19 (2) of the Matrimonial Causes Act, 1950.

Yours faithfully,
J. F. Kelemen.

Kenton, Middlesex.

REVIEWS

The Nature of Legal Argument. By O. C. Jensen, Professor of Philosophy, University of Natal. [Oxford: Basil Blackwell, Ltd. 1957. xv and 166 pp. 18s. net.]

The author of this book claims "that the nature of legal argument has been misrepresented in juristic writings, and that therefore there is a need for a re-examination from a new standpoint of the kind of concepts, rules and methods of reasoning used in deciding legal cases."

Part I opens with an exposure of the not uncommon idea among lawyers that "logic" means syllogistic reasoning and is a narrow, rigid mode of reasoning inadequate for the judicial task. Professor Jensen reminds us that syllogistic reasoning is not the whole of logic and is not the part most important for the lawyer. The easiest bit of the journey to a legal conclusion is usually the formal deduction: "All S is P; X is S; therefore X is P." What is really difficult is to decide whether or not X is S, whether, for instance, the object under advisement is or is not a *Rylands* v. *Fletcher* object. "Legal reasoning revolves mainly around the establishment of the minor premise." The main problem for the lawyer is the problem of classification and this also is a logical problem.

So far, so good, but we could wish that Professor Jensen, being a philosopher, had gone on—perhaps following the lines of E. H. Levi's brilliant *Introduction to Legal Reasoning* (1948)—to give us a philosophical account of the mechanism required for "a moving classification system." Instead, he concludes his Part I with a short chapter instructing the lawyer in the nature of Deduction, which he has just said to be of little legal importance, and of Induction, which he tells us is not involved in legal judgment at all. On this latter point his argument seems sheer question-begging. "Induction," he begins (p. 28), "is a procedure for arriving at natural laws, and at other generalisations, which state how events are related. From these general statements we can predict and anticipate events." On this definition he constructs a long *reductio ad absurdum* somewhat as follows: *If* a judge by Induction reaches a general rule that, given certain facts, a court will decide in favour of P, and if the relevant necessary facts are present in the case before him, that judge may "predict" that the decision in the case before him will be in favour of P, and he will then have to "wait passively" to see what the decision (his own decision!) will be, to find out whether or not it supports his general rule; *but* this is a ludicrous account of the judicial process; *therefore* judges do not use Induction. Professor Jensen might have employed his energies more fruitfully if he had accepted that, whatever be the definition of Induction properly so-called, our judges do employ some sort of thought-process which moves from particular to general, and had tried to give us a philosopher's account of this process. Once again he might have found some guidance in E. H. Levi.

We pass to what from the chapter headings we should expect to be the most novel and exciting part of Professor Jensen's work. This is a philosophical analysis of the reasoning in actual cases from the reports, English, American and South African, eleven cases being chosen on contributory negligence, five on remoteness and causation, and thirteen on attempts.

In dealing with negligence and causation Professor Jensen makes some good points. He observes that it is probably the lawyers' notion of causation as involving a "causal series" that has prevented them from bringing the problems of contributory negligence and remoteness under the same principles. It is strange, as he remarks, that the lawyers, finding that their (unphilosophical)

notion of causation leads them into difficulties, conclude, not that their notion should be reconsidered but that it should be retained and its working complicated by the introduction of other (unphilosophical) notions such as remoteness. His discussion of the ambiguities of "last opportunity" is good. On the whole he succeeds in showing that the terms employed by lawyers in this difficult chapter of the law do not help towards a solution; they are mere counters whose use is apt to lead to circular argument. These points, however, are not all new to academic lawyers, and Professor Jensen might have found some of his criticisms anticipated in their writings, for instance in Professor Goodhart's "The 'Last Opportunity' Rule." [1]

The value of Professor Jensen's own constructive offering is more dubious. On contributory negligence he says (p. 45), "It is difficult to see why the common-sense approach should not be adopted in cases at common law." This common-sense view (outlined at pp. 41 *et seq.*) is based on Professor Jensen's notion of "the plain man," "everyday life," "ordinary talk" and "what we" (*scil.* "we plain men") "are inclined to say." In this alleged common-sense view the phrases "the cause of the mischief," "the one responsible" and "the one who deserves to suffer" are "logically equivalent" (p. 44, *cf.* p. 42 but note that on p. 43 we are told that "the concept of responsibility is not equivalent to that of cause as applied to human agencies, for it is a richer concept"). "Responsibility" means both that "it is reasonable to *punish*" (reviewer's italics) "the person who is responsible" and also that this person should make compensation for the "evil" caused by his "misdeed." The "common-sense" conclusion is that where injury is the "result" of the negligence of two parties, the loss should be apportioned between them "in proportion to their culpability" and, says Professor Jensen, "it is difficult to see why the common-sense approach should not be adopted in cases at common law." This is, of course, as Professor Jensen knows, the approach adopted in the 1945 Act, and we may observe that Professor Jensen, like the Act, does not construe for us the word "result." It follows that either (1) like the Act, he has left open the whole problem of causation and remoteness, or (2) if he thinks to have solved it by his equivocations between "cause," "responsibility" and "deserving to suffer," his solution amounts to no more than that those who deserve to suffer deserve to suffer and they deserve to suffer in the proportion in which they deserve to suffer. Who is to determine this proportion? The Act at least refers us to the court's sense of "what is just and equitable" but Professor Jensen gives us no guidance at all.

Professor Jensen's undiscriminating use of "cause," "responsibility," "blame," "wrongdoing," "misdeed," "culpability," "punish" suggests, and the impression is confirmed by his first sentence on page 45 and by his discussion of Justice on page 91, that he has not seriously considered the problems of liability without fault. Even if he is disinclined to examine the voluminous modern literature on the subject, he might at least have discussed the opinion of Blackburn J. on what "seems but reasonable and just" in *Rylands* v. *Fletcher*, L.R. 1 Ex. at page 280.

When he specifically addresses himself to the problem of remoteness Professor Jensen has little to offer beyond the suggestion (p. 92) that "it is worth considering whether a quite new approach should not be sought" and that analysis of legal reasoning "might pave the way for a more earnest reflection on the purposes of our legal institutions and on how the law as actually administered affects the interests and demands of the various members of the community." But he does not point out the way.

So, too, in his discussion of attempts he shows up the purely verbal and circular nature of many of the tests that lawyers have tried to use, but for positive help he offers nothing more (pp. 160–161) than that, on the one hand, "when a person's act is unmistakable evidence of his criminal intentions, we are dealing with a person who is sufficiently dangerous to society to justify

[1] (1949) 65 L.Q.R., p. 237.

the court in using force to deter him in future from embarking on a criminal course," while, on the other hand, "not every movement towards committing a crime, especially when it has not gone beyond merely the intention to do so, should be punished." A lawyer untrained in modern linguistic philosophy may wonder how these tests are to be applied in practice and, in particular, what is meant by a "movement" which does not go beyond an "intention."

The phrase on page 159 "*an actus reus, i.e.,* a crime" raises a suspicion that linguistic philosophers do not trouble about the ordinary lawyer's meaning of legal terms. There are other indications of Professor Jensen's imperfect acquaintance with legal techniques. He uses (p. 57 and p. 62) the terms "final verdict" and "verdict" for the decisions of an appellate court. His statement of the rule in *Rylands* v. *Fletcher* (p. 11 and p. 19) omits the important words "brings and collects," nor does he heed the qualification "not naturally on the land." He offers a "strictly logical" solution of *Read* v. *Lyons* which depends upon a tacit assumption that "escape control" and "escape" are synonymous. He is weak on judicial titles: Baron Parke should not be called "Lord Parke," nor is the rank of a Lord Justice of Appeal sufficiently approximated by what a marksman might perhaps call a process of "bracketing," describing him first as "Lord Scott" and at the next shot as plain "Scott." He is weak on judicial names: he turns Channell, B. into "Channel, B." Lord Finlay into "Lord Findlay," Lord Normand into "Lord Norman" and Lord MacDermott into "Lord Dermott." He is weak on judicial identities; on page 99 he quotes certain words of Lord Cooper from *Steel* v. *Glasgow Iron & Steel Co.,* 1944 S.C. at page 251, which he inexplicably attributes to a "Lord Somerville."

In other ways, too, Professor Jensen shows his unfamiliarity with the reports. When among the older reports, he turns M. & W. into "M.W." and for *Tuff* v. *Warman,* 5 C.B.(N.S.), 573 he gives the curious reference "Ex.Ch.231," an idiosyncratic compound of the name of the court and the page of the relevant volume (vol. 141, but Professor Jensen does not tell us this) of the reprint in the *English Reports.* Among modern reports he is no more successful. He does not appreciate that it may be necessary to distinguish between several A.C. or K.B. volumes of the same year, and he uses square brackets in references to T.L.R. and L.T. He may be pardoned for giving only the All E.R. reference to *Admiralty Commissioners* v. *North of Scotland, Orkney & Shetland Steam Navigation Co.*—it takes a certain expertise to find the L.R. reference to that case—yet it is slovenly to vary the name of the company each time he mentions it. But why should he give only the T.L.R. reference to *Hyett's* case which is in both All E.R. and L.R.? And why should the defendant in this case be called the "Grand Railway Co."? Surely, even if a South African author is unfamiliar with our railway system, an Oxford publisher should know the Great Western Railway.

The grammatical pedant may be irritated by such sentences as (p. 78—reviewer's italics): "Perhaps the main reason why *the law* does not bring the two kinds of cases under a common principle is that *their* theory of causation includes the idea of causal series, and because of this idea *lawyers* think . . .". Grammatically "their" must refer to "cases" but the context suggests that it refers to "the law" or "lawyers." Which is meant?

As for other matters editorial, we find some references to "*op. cit.*" and "*ibid.*" which are not as clear as they might be, and we would suggest that it would be both courteous and helpful if an author whose views are to be discussed were properly introduced at his first appearance; we should not be allowed to meet "Turner" seven times before we learn that he is "J. W. Turner," (to lawyers better known as J. W. C. Turner). There are some minor misprints. There is no Index. And at the foot of the last page (p. 166) the bemused reader will find two lines of surrealist irrelevance; actually these are a sort of footnote to page 148.

This book should not have been published in its present state.

A. H. Campbell.

THE APPROACH TO SELF-GOVERNMENT. By SIR IVOR JENNINGS, K.B.E., Q.C., LITT.D., LL.D., F.B.A., Master of Trinity Hall, Cambridge. [Cambridge University Press, 204 pp., 1956. 16s. net.]

SIR Ivor Jennings here applies his wide first-hand experience of the Asian countries of the Commonwealth to the general problem of converting dependent territories into independent countries. Our own methods of Parliamentary and Cabinet government are the only methods the British understand, and they seem to be the only ones which, suitably modified, dependent peoples want to adopt. What conditions must be present if the British system is to be applicable, and what adaptations may be required in various kinds of territory? The initial problem, Sir Ivor shows, is the unit of government. "Self-determination" is a futile expression until someone has decided what unit shall do the determining. A homogeneous society must be created in which conflicting racial, religious, linguistic or regional loyalties will not be too strong. An independent country needs to be economically viable. It must provide for its own defence and the handling of external affairs. It must be capable of efficient government, the structure not being too complex in relation to the population. Our attention is then directed to such problems as elections, the legislature, the executive and the administration. The difficulties concerning elections—which can hardly be imagined by anyone who has not been among illiterate, politically backward peoples—are particularly well described.

We think Sir Ivor is right in regarding a transitional period, not necessarily short, as essential before complete independence. The desire for self-government is itself stimulated by British political ideas. Nationalism, more or less aggressive, marks the later stage in the development of a colony. In effect there is only one party, whose aim is to end "colonialism"; but the British political system presupposes two main parties or groups, with an effective opposition capable of providing an alternative government. Capable leaders can probably be found quite easily to fill the few Ministerial posts; but behind them the bulk of their supporters may be characterised more by ambition than integrity or acumen. Perhaps the most important message the book conveys is the urgent need for an honest and efficient administrative staff. The dearth of administrators is largely a question of education, and the main obstacle in the way of education is the cost. With goodwill, understanding and patience, however, these problems can be solved.

The book is not only very readable, but it gives sane political advice which those concerned will not lightly disregard.

O. HOOD PHILLIPS.

THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM. By RUTH LOCKE ROETTINGER. [Public Affairs Press, Washington, D.C. 1957. vii and 252 pp. $4.50 net.]

THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW. By LEONARD W. LEVY. [Harvard University Press. London: Oxford University Press. 1957. ix and 383 pp. £2 12s. net.]

THE Tenth Amendment to the Constitution of the United States of America declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This residual power of the states may cover such matters as public safety, health, morals, certain aspects of race relations, and general welfare. In 1827 Chief Justice John Marshall called it the "police power,"

and this appellation has been adopted in American constitutional law. Dr. Roettinger's book is concerned with the delimitation of this power by the United States Supreme Court between the years 1930 and 1956, thus providing a sequel to the work of Professor Thomas Reed Powell in his *The Supreme Court and State Police Power, 1922–1930,* published in 1932. Two chapters are introductory to the subject and the period; the next four, which form the bulk of the book, contain a digest of the cases before the Supreme Court; and the last three chapters provide the author's conclusions. Dr. Roettinger considers no fewer than 481 cases of widely different subject-matter, in which it was alleged that either a state or the federal legislature or government had exceeded its powers and transgressed the Tenth Amendment. It is interesting to find that the Supreme Court has varied considerably in its interpretation of different kinds of federal and state action, which might or might not be held to be an exercise of the "police power." This study covers a period of the Supreme Court under four Chief Justices, Hughes, Stone, Vinson and Warren, and the author finds that state jurisdiction was held legitimate in 51 per cent. of the cases. She believes there is evidence that the court, after a rather chequered career in this field, is now slowly but surely moving back to Chief Justice Taney's conception of the nature and reach of the police power as that ultimate authority over local polity reserved to the states as a fundamental feature of the federal system. This conclusion is maintained despite the fact that state power has not fared particularly well in the Warren court, where only 32 per cent. of the cases have been decided in favour of the states. But Dr. Roettinger considers this to be largely due to the attitude of that court to the sedition and segregation cases. This attitude she believes to be an exception to the general trend, and a very regrettable one, but the reader might be excused for feeling that the author has placed great emphasis on statistics, only to discard them at the last minute! The account of these latter cases is bound to be incomplete, ending in June 1956: as is well known, the struggle is still on. The author, who is a Southerner, has presented the case for the states, and particularly the Southern states, with restraint, but the reader has no difficulty in seeing where her heart lies.

It would appear, therefore, that this book should be a useful one for constitutional lawyers, and particularly for those interested in federal systems, even though it has been written by a political scientist rather than a lawyer. Unfortunately the volume has considerable defects. It is not a novelty to find an American book with the footnotes collected all together at the end of the text, but this work has no footnotes at all. A list of "Sources" appears in pages 233–239, some of them grouped under chapter headings, but even there the works are quoted as a whole, without any indication of the pages or parts referred to (nor of the pages of the text the reader is referred from). An example of the confusion that arises can be taken from page 4, where the author quotes extracts from McIlwain, Hamilton and Dicey. The "Sources" for Chapter 1 do not disclose any particular pages of the works referred to. Moreover, three works of Charles McIlwain are cited, yet no clue is given in the text as to which is being quoted. Again, the 481 cases discussed appear without any trace of their references. A political scientist cannot be expected to write in the style and form of a lawyer, but the author has ventured upon a book dealing primarily with law and cases in the Supreme Court of great constitutional importance. It is therefore reasonable that constitutional lawyers should wish to read the book. Yet, as it stands, it can only be a suspect secondary source for lawyers providing one background viewpoint to the problems involved, without being of any practical significance. The treatment Dr. Roettinger employs might be excusable in an introductory book, but this volume is intended to be a definitive account of the subject. It is, perhaps, also fair to say that it is an extremely difficult book to read. In the chapters which are not dealing specifically with cases, the author quotes passages written by jurist after jurist, with scarcely a pause to give a summary

of the progress of the argument to date. The result is that the book is a mass of different writers and styles. Many pages have hardly more than a line or two of the author's own words, and the reader cannot settle down and become used to a single writing style. When this fault is added to the difficulty of checking up on sources quoted as mentioned above, the reader may well feel with the reviewer that his task is too great!

A few other blemishes might have been avoided. Thus there is no need to assure the reader more than once that Powell was an eminent professor of constitutional law (pp. 17, 196), or that Thomas Cooley was one of the great authorities on the American Constitution (pp. 13, 218). It is strange that a political scientist of a country where the separation of powers is practised sometimes uses the terms "legislation" and "government" more or less interchangeably. The stage is set rather unhappily by the second paragraph of the author's own preface (p. iii): "The authority to legislate for the public safety, health, morals and general welfare resides in the states except as authority has been delegated to the federal government or prohibited to the states by the Constitution." Again, when Dr. Roettinger is writing in her own words, she sometimes poses a string of connected, but rather melodramatic, questions. Thus (pp. 196–197): "Should the people be protected from unwise action and be safeguarded by some wise and good elite? Or should they be allowed to make their own fumbling way? Can the people be trusted with self-government? Is there enough sound judgment, enough goodwill in the people to make self-government a sound gamble? Can we risk leaving our burning public issues to the sane second thought of the governed?" The point could surely be made in a single sentence.

This book might well have been of great value. Perhaps it is of value to political scientists. But it should also have been a guide to constitutional lawyers on the vexed question of the interpretation of the Tenth Amendment. It is sad that as it stands it cannot fulfil this purpose, and that Dr. Roettinger cannot thus reap the reward of her labour and scholarship.

The Law of the Commonwealth and Chief Justice Shaw is a very different kind of book. Professor Levy is an historian and not a lawyer, as he disarmingly confesses on page five, but he believes legal history should not be abandoned by the historians to the lawyers. Yet, after this preliminary caution to his lawyer readers, the author proceeds to unfold a remarkably deep knowledge of those parts of the law with which he is dealing. The book is in many ways a model of legal biography. Footnotes even appear on each page, case references are quoted correctly, and Professor Levy's style is attractive and fluent. He is primarily concerned not with the life-story of a judge (which occupies only twenty-one pages in all—for any fuller account he refers the reader to Frederic Hathaway Chase's biography, published in 1918), but with his judicial decisions. The period is that of 1830–60, when Lemuel Shaw was Chief Justice of the Supreme Court of the Commonwealth of Massachusetts. Thus the student of American cases is for once directed to state, and not federal, court decisions. The author protests at the preoccupation of scholars of American legal history with the opinions of the Supreme Court of the United States, and in this one limited field he endeavours to bring some life out of the state reports, which he calls the "wasteland of American legal history" (p. 3).

The period is one of great development of Massachusetts law, just as it is throughout the whole of the United States. Economic changes, such as the coming of the railroads, were posing entirely fresh legal problems. Massachusetts was fortunate in possessing for thirty years a Chief Justice who was both humble in seeking the views of his colleagues and forceful when he had reached his decision. He was not an exhaustive researcher, and his judgments were sometimes quite devoid of citation of previous cases, but he conceived law as a growing science, and his opinions, when given, contained deep and full exploration of the basic principle at issue. His wish was to make the

law coincide with justice and his more harsh decisions can often be explained by the period of history in which he lived. It should not be forgotten that he presided over his court at a time when fugitive slaves often crossed into Massachusetts, bringing with them many attendant problems, and when religious strife raged. His judgments were swayed far more by natural justice and economic need than by old English precedent. Thus he moulded the common law to the needs of a progressive American state. It is perhaps astonishing that of the 2,200-odd opinions he gave as a judge only one was a dissent from his colleagues. In all but three of his fifty constitutional opinions the court was unanimous, which compares favourably with Chief Justice Marshall of the United States Supreme Court, who carried the whole court with him in only twenty-three out of thirty-six such cases.

A separate chapter is devoted to each of the fields of law to which Shaw made a significant contribution. The leading American opinion on the "fellow-servant" rule, which corresponds with the now abolished English defence of common employment, was given by Shaw in 1842 (Chap. 10). The Chief Justice's judgments on the "police power" (Chap. 13) are useful in comparison with Dr. Roettinger's book, for they show the development by a state court of the state's powers under the Tenth Amendment. But perhaps Chapter 7 on segregation is of most interest to modern eyes. We find Shaw, delivering the unanimous opinion of his court, upholding to the fullest extent the power of school authorities to enforce segregation. He it was who originated the famous "separate but equal" doctrine, which became accepted by both state and federal courts, and was not fully repudiated until the celebrated opinion of Chief Justice Warren speaking for a unanimous bench of the United States Supreme Court in *Brown* v. *Board of Education of Topeka* in 1954. Professor Levy is impartial on the subject of states' rights in the sense that he, like Shaw, is far more concerned to see justice done to individuals than to argue in favour of strict legality from precedent. Possibly those of Dr. Roettinger's persuasion might argue that in this respect he has an advantage over those trained in the law, though even this would have to be qualified, for Professor Levy now has the United States Supreme Court solidly behind him on this point. At all events this book is warmly recommended to all students of American constitutional legal history.

D. C. M. YARDLEY.

ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS. Herausgegeben von MITGLIEDERN DES BUNDESVERFASSUNGSGERICHTS. Vol. 6. 1957. [J. C. B. Mohr (Paul Siebeck) Tübingen. viii and 488 pp. DM. 25.]

THIS volume of the decisions of the German Federal Constitutional Court is no less interesting to lawyers, historians and sociologists than its predecessors. In some ways it is perhaps even more interesting. It may be sufficient to indicate the type of problems the court had to face by referring to two out of the twenty-five cases reported in this volume.

The applicant in one case had been convicted under sections 175 *et seq.* of the German Criminal Code. These sections provide that the commission of certain types of homosexual activity between persons of the male sex constitutes a criminal offence and is punishable with imprisonment and under certain conditions with hard labour. The applicant claimed that these sections were incompatible with the rule in the Basic Law which stipulates the rule of equality between sexes. The court, after hearing expert evidence from a number of distinguished psychiatrists, psychologists, a professor of sociology, the leader of a youth office and the head of the Cologne criminal police, rejected the application on the ground that the principle of equality between

sexes had no bearing on legal rules which find their basis in the biological differences between men and women. The applicant also alleged that homosexuality was no longer disapproved by Western European society at large, as was witnessed by the fact that it no longer constituted a criminal offence in many countries. The court, however, refuted this argument by pointing out that it was quite a different matter to hold that it was not practical to punish certain acts and to believe that they were morally unobjectionable. It is no overstatement to say that the judgment constitutes a most telling commentary on the Wolfenden Report, in particular because the findings of the various experts are set out in great length.

In a judgment published in the third volume of its decisions the Constitutional Court had held that all former civil service positions had come to an end on May 8, 1945, on the ground that these positions had deteriorated into mere service relationships with a totalitarian régime with the effect that the identity of the new and the old Germany could not possibly result in the continuation of a legal tie between the Federal Republic and Hitler's civil servants. It goes without saying that this judgment was very severely attacked by numerous legal writers, many (though not all) of whom had been among the "intellectual" leaders of the Nazi system, but had managed to re-establish themselves as legal writers under the democratic system. In its decision of February 19, 1957, the Constitutional Court took the unusual step of answering in great detail—and it may be added convincingly—these various critics. The decision, which is couched in the most forthright terms, lists the numerous monstrosities which the Nazi State made it the duty of its officials to commit. Some of the material used by the court is unpublished and has not been known hitherto. Perhaps even more important is another aspect of the decision. Dr. G. Schwarzenberger has recently drawn attention to the "unofficial, but firmly established West German academic convention not to refer to the *sacrificia intellectus* of any reappointed teacher during the era of the Thousand Years' Reich" (*Year Book of World Affairs*, 1957, p. 377). The Constitutional Court happily did not find itself bound by this convention. With refreshing vigour it made use of the fact that some of its critics, as, *e.g.*, Forsthoff, E. R. Huber, Herbert Krüger, could best be refuted by recalling some of their most pointed pre-1945 utterances. As to their plea that they had not meant what they then wrote, the court drily remarks that there was no reason whatever for taking their former writings less seriously than their present ones. One may hope that the court's energetic accusation of those who have committed what is now claimed to have been a *sacrificium intellectus* will not pass unnoticed in Germany and elsewhere.

E. J. Cohn.

Principles of Administrative Law. By J. A. G. Griffith, ll.m., Reader in English Law in the University of London, and H. Street, ll.m., ph.d., Professor of Public Law and Common Law in the University of Manchester. [London: Sir Isaac Pitman & Sons, Ltd. 2nd ed., 1957. xxxvii and 324 pp. 40s. net.]

Five years ago we gave a warm welcome to this first textbook published on English Administrative Law, a work of careful analysis and sound judgment (16 M.L.R. 248). The learned authors have now taken the opportunity of bringing the text up to date without altering the size and character of the book. Although twenty-seven new Acts of Parliament and twenty-two new Statutory Instruments have been considered, the number of cited cases increased by one-third and a select bibliography inserted, the text is only eight pages longer. This is a tribute both to the care with which the first

edition was prepared and to the efficiency with which the revisions have been made. That the work has been thorough is shown by numerous alterations in detail. The report of the Franks Committee on Administrative Tribunals and Enquiries was published after the book went to press. If, as seems likely, the main recommendations of that Committee are put into effect, the agitation for institutional changes in our administrative system will probably subside for the next ten years, but a third edition of *Griffith and Street* will no doubt be needed before very long to review the first working of the Franks reforms.

To all who take this subject seriously we recommend the new edition of a most useful textbook. The quinquennial increase of 33·3 per cent. in price was perhaps inevitable, but the publishers should have put some mark on the spine to distinguish this edition from the first.

O. Hood Phillips.

The Principles of Modern Company Law. By L. C. B. Gower, ll.m.(Lond.). 2nd ed. [London: Stevens & Sons, Ltd. xlvii and 605 and (index) 25 pp. £2 10s. net.]

The well-known handbook *Where to find your law* places this book among the student's textbooks on company law. In the opinion of this reviewer this is a mistake. It is an original and stimulating exposition of the *principles* (the italics are mine) of modern company law, but one which to the student represents, in the language of the military training manuals, "advanced handling." On the other hand it is a legal classic and at the same time a most valuable book for practitioners.

It is customary among those who practise the law to deride the books of university professors as not being sufficiently firmly planted in the ground. But there are exceptions which prove the rule and this is undoubtedly one of them. While it is not the complete work for practitioners (because the author has not allowed himself to get bogged down in the detailed provisions of the Companies Acts) it is a most salutary reminder for those that have forgotten and teacher for those who have never learnt that company law has principles which are not to be found in the Act.

All the more difficult problems with which a company practitioner is faced will be found to be questions of principle, and this book contains the most comprehensive discussion of a large number of them, in which the author is not afraid to criticise some of the accepted theories, but avoids the cardinal academic error of dismissing inconvenient decisions of courts below the House of Lords as wrong.

Thus the book contains valuable reasoned considerations of the following among other matters. (1) The rule in *Royal British Bank* v. *Turquand* (pp. 141–160). (2) The rule in *Foss* v. *Harbottle* (pp. 528–538). (3) The modification of class rights (pp. 462–470). (4) Oppression of minorities (pp. 507–525). (5) The circumstances in which the court will "lift the veil" (*sic*) of incorporation (pp. 183–209) and (6) The degree to which the Memorandum and Articles constitute a binding contract (pp. 251–255).

It would be too much to expect that the reviewer should agree with Professor Gower's analysis of every one of these topics. In fact he does not, but that is true of every worthwhile piece of writing. The analysis is penetrating and exhaustive, and always ventures a conclusion even upon the most controversial points. In such cases it is only conceit (sometimes euphemistically called "lifemanship") for a reviewer to make a selection of the points on which he disagrees with the author and use his review as an opportunity for airing them in print in an attempt to demonstrate (contrary to the truth) that he is wiser than the author. Accordingly he will content himself with saying

that when his brief compels him to support the author's views (whether they differ from his own or not) these will furnish him with the arguments well marshalled.

The book is divided into five parts. Part 1 is a historical introduction to the subject, which came as a revelation to the reviewer who had never appreciated what a chequered career companies had in their early days. Part 2 deals with the consequences of incorporation and contains among other things the chapter above referred to on "lifting the veil." Part 3 deals with the method of incorporation and flotation and contains the best analysis available on the requirements of the common law and statutes as to disclosure and otherwise on the securities to the unsuspecting public. Part 4 deals with the forms of investment in companies and in general deals with the rights (short of litigation) of members and debenture-holders. Part 5 deals with investor and creditor protection, and the various remedies at law that members and creditors can pursue. It is this part which in 18 pages rather summarily (by comparison with the rest of the book) deals with the topic of liquidation.

The whole work comprises more than 600 pages of text and as a whole it cannot be too highly recommended. Its price is remarkably low for a legal textbook and no doubt is a mark of the publishers' confidence that it will deservedly have good sales. The index is, however, rather sketchy by comparison and the book merits a better one.

J. G. Monroe.

Copyright Law Symposium No. 8. [Columbia University Press and Oxford University Press. 28s. net.]

This publication contains the two joint prize-winning essays for the year 1956 in the Nathan Burkan Memorial Competition and two other essays considered by the judges worthy of particular mention. The standard of contribution to this competition, as judged by the winning essays which have been published from time to time in previous symposiums, has generally been high and on this occasion is equally so.

The first essay, "Piracy in High Places—Government Publications and Copyright Law," by Maurice B. Stiefel of the George Washington University Law School, forms an interesting dissertation on United States copyright law in so far as this concerns the United States Government. On the one hand, there is the question of liability where copyright material is used for government purposes and on the other hand there is the question of the rights subsisting in material prepared for or on behalf of government departments.

It would appear that, so far as governmental infringements are concerned, the law in the United States is as it was here before the passing of the Crown Proceedings Act, 1947, that is to say that, while the individual government employee guilty of an infringement could be made personally liable, no action would lie against the government itself. It will be recollected that under section 3 of that Act, where any servant or agent of the Crown infringes any right of industrial property, with the authority of the Crown, civil proceedings in respect of the infringement lie against the Crown and this provision is expressly applied to copyright under section 39 (8) of the Copyright Act, 1956. Apparently no such right exists in the United States.

A further question, which has arisen in the United States, is how far the publication of copyright material by the Government will deprive the copyright owner of rights against third parties who subsequently reproduce the material from the government source. This matter in the United States is complicated by the requirement of United States copyright law that a notice reserving copyright shall appear on all publications of the material. It is apparently thought that, if the government publication is with the consent of the copyright owner, and the government does not print any reservation, the

owner may lose his rights. No similar question could, it is thought, arise here, since there is no necessity here to reserve copyright expressly by notice.

The essay then proceeds to deal with how far government publications are themselves protected and there is an interesting historical note showing how it came about that no copyright is to be deemed to subsist in any United States Government publication. The only remedy open, apparently, is where the material is reproduced with additions and alterations which might lead to the public being misled. In this country the Copyright Act of 1911 vested in His Majesty the copyright in any work prepared or published by or under the direction or control of His Majesty or any government department and this position is substantially maintained in the Copyright Act of 1956. Prior to 1911 it would appear that, apart from the special prerogative rights in Bibles and Prayer Books and possibly in other Acts of State such as Acts of Parliament, copyright protection was enjoyed in accordance with the ordinary law, that is to say that the copyright vested initially in the author whether he was a government employee or not and whether it was subsequently vested in the Crown depended upon whether there was any assignment. It should be observed that the automatic vesting of copyright of employees in their employer, except in the case of compilations to which section 18 of the Copyright Act, 1842, applied, did not subsist before the Act of 1911. There remains therefore, so far as this country is concerned, some doubt as to the ownership of copyright in material such as diaries and letters prepared by government servants before 1911. While, as has been seen, all government material now vests in the Crown, it was announced in a Treasury Minute of 1912 (varied in 1958) that Crown copyright will only in general be strictly enforced in respect of such material as official books, literary works, charts and ordnance maps and that such works will bear an indication on the title page that the copyright is reserved.

A further matter in which United States law appears to differ from ours is that there appears to be a wider acceptance of the view that publications written by government employees at the request of the government but in the employees' own time, should belong to the employee so that he is entitled to secure copyright for them in his own name. This presumably is a necessary corollary of the determination that the government itself should have no rights in government publications.

The second essay, "Protection of Comic Strips," by Nathan Newbury III of Harvard University Law School, deals with a subject which is frequently encountered by legal practitioners concerned with copyright matters because of the very great commercial value attached nowadays to comic characters created in strips and films and thereafter exploited in the medium of advertisements and for toys, dolls and many other kinds of goods.

The legal problems in the United States appear to be very similar to those encountered in this country, namely, whether a character of this kind can be protected by a registered trade mark or by the law of passing off or by the law of copyright. The essay refers to the very large number of United States decisions on these matters and indicates the difficulty of protecting what may in fact be no more than an original idea. In this country it will be recollected that the protection of a comic strip character was the subject of the decision of the House of Lords in *King Features Syndicate* v. *Kleeman Ltd.* [1941] A.C. 417 where it was held that artistic copyright subsisted in the cartoon character "Popeye the Sailor" and that such copyright was infringed by brooches and toys reproducing the artistic design of the character. The difficulty about this sort of claim is of course that the character is represented by the artist in a very large number of different poses and there may thus be a difficulty in saying which pose has in fact been infringed by the alleged infringement. The author of the essay deals with the situation which might arise where the character had been represented for the full term of copyright so that the original representations were in the public domain, though it may seem unlikely that characters of this sort will maintain their value for the full

term of copyright protection. The author does not deal with the question which arose in the *King Features* case, namely, how far protection should be given where the character is reproduced in effect as an industrial design on toys and other articles of commerce. The law on this subject in this country has been completely altered by the Copyright Act of 1956 and it will now be found that the owners of the copyright in such material are in much greater difficulty in protecting their designs for industrial use since they will have to be registered if they are to be protected. While it is understood that similar problems do arise in the United States, they are not mentioned in the essay in question which confines its attention to the ordinary law of copyright.

The third essay, "The Universal Copyright Convention and the United States: a Study of Conflict and Compromise," by William C. Wells, University of Illinois College of Law, gives an historical view of the attitude of the United States to the copyright of foreign authors leading up to its adherence to the Universal Copyright Convention. While the essay undoubtedly collects the material in an interesting form, one is led to believe that the author has had little practical experience of copyright problems. What the foreign lawyer is now most interested to learn is how the United States courts will interpret the requirement of the Convention that all copies of a work are to bear the symbol © in such manner and location as to give reasonable notice of claim of copyright. Problems arise where short stories or serial stories are published in a magazine and the magazine merely has a licence. And what is the position with regard to photographs and illustrations of different ownership appearing in a book or periodical? The practice appears to be being established since the commencement of the Convention of having a list on the title page of a periodical indicating the various copyright claims in respect of the various material appearing. But very often the publisher may not be aware of the proper claim in respect of some of the material published.

The final essay is on the "Depreciation and Income Aspects of Copyright under the Internal Revenue Code of 1954" by Stephen E. Strom of the University of Missouri School of Law. This is obviously a careful and interesting essay but it is impracticable for anyone not conversant therewith to criticise an essay on the highly complicated Revenue law of another country. It is interesting, however, to observe that in the United States as in this country authors are now allowed to spread their income over a period where the creation of the work has taken more than one year.

The selection of essays as a whole well repays reading by anyone interested in copyright law. The essays show that very similar problems arise in the United States and in this country and it is of value to see the similarities and dissimilarities in the solution to such problems.

F. E. SKONE JAMES.

BENAS AND ESSENHIGH'S PRECEDENTS OF PLEADINGS. By BERTRAM B. BENAS, MARY HOLT and JEFFRYS COLLINSON. Second edition. [London: Sweet & Maxwell, Ltd. 1957. xiv and 612 pp. £3 10s. net.]

THIS is the second edition of a work with which practitioners have been familiar for some thirty-four years. There are 250 common law pleadings, prepared mainly by Mr. Collinson, 349 Chancery pleadings, prepared mainly by Miss Holt, some thirteen pages of what are called "General Forms," and seven pages of precedents suitable for use in the Court of the County Palatine of Lancaster.

The division of labour between Mr. Collinson and Miss Holt has given the book a rather uneven look. Thus references to the Rules of the Supreme Court are invariably given in the Chancery portion, but never in the common law section. There is one index for common law forms and a separate

index for Chancery forms. There is also some duplication; thus precedents in which fraudulent misrepresentation is alleged appear in both sections.

As a matter of principle the editors have decided to omit procedural forms. Thus there are no precedents of contribution notices between co-defendants, or of third party proceedings, Order 14 procedure, interrogatories or requests for further and better particulars. It is perhaps no more than a matter of opinion whether a collection of precedents ought to include such forms; the opinion of this reviewer runs contrary to the editors' opinions.

The publisher's commendation to his public states that these forms are precedents in the highest sense in that each has formed part of actual litigation, and "many have undergone further ordeal in court or in chambers." If this be so, and there is no reason whatsoever to doubt it, the name of the case in which the pleadings were thus referred to might surely have been quoted.

On page 295 the pleader bases a claim to a right of way upon the Limitation Act, 1939, a slip for the Prescription Act, 1832.

The increased jurisdiction of the county court, especially if it is followed by a revision of the income limits for legal aid, undoubtedly emphasises the value of this collection of precedents. There will be a warm welcome for this book, whose range of precedents, from "Agency" to "Work and Labour" omits no important topic of substantive law. The forms of the precedents are exemplary and are warmly commended.

Allister Lonsdale.

Law Relating to Auctioneers and Estate Agents. By D. MacIntyre. [London: Sweet & Maxwell, Ltd. xxi and 253 pp. £1 10s. net.]

The author has set out "to provide auctioneers and estate agents with a comprehensive, yet concise, account of those principles of law which are likely to be of direct concern to them in the conduct of their daily business." He sets out the authority of auctioneers and estate agents, their rights, duties and liabilities; he discusses the auctioneer in the sale room, evidence of the contract, and boldly and confidently deals with the difficult topic of the estate agent's commission.

The author's style is attractive. His prose is lucid and his expressions are carefully chosen. There is a free citation of authority, some 400 cases being included in the table of cases. But these are not just thrown in to pad out the footnotes, for a welcome feature for a book such as this is the frequent quotation in the text of the words of the judgments themselves. In a book for law students such a course may be dangerous, in that the lazy man will not therefore bother to read for himself the whole of the judgment; but for the reader for whom this book is intended such a course is probably the nearest approach to perfection.

Sandwiched in the centre of the book is a chapter on Particulars and Conditions of Sale. The author is careful to warn the student in the preface, that "in the case of sales of land at least, it is advisable that these should be settled by solicitors and counsel." This warning is salutary, for it is this subject perhaps above all others which gives rise to litigation.

This chapter would be improved by the inclusion of a few precedents; no precedents, in fact, are set out at all in this book. There is, moreover, scant indication of the limits of the efficacy of exception clauses. *Curtis* v. *Chemical Cleaning and Dyeing Co.* ought to have been referred to on page 108 as an example of misrepresentation vitiating the exception clause. No difference is drawn between a condition, the effect of whose breach may be

provided for, and a fundamental term; see, for example, *Karsales* (*Harrow*) v. *Wallis*. But these are minor criticisms of a book which is cordially recommended.

Allister Lonsdale.

Εἰσαγωγὴ εἰς τὴν Επιστήμην τοῦ Δικαίου. (Introduction to the Science of Law.) By Petros G. Vallindas, Professor at the University of Thessalonica. Third edition. [Thessalonica: Bibliopoleion Bas. Sakoula. 1957. 142 pp. No price stated.]

This book, which is the work of an eminent Greek scholar, is based on an introductory course of lectures that the author delivered at the University of Thessalonica in the year 1956–57. It is divided into three parts. The first, dealing with "General Notions," comprises a great deal of what is, in this country, termed jurisprudence, for example, the meaning of law, morality and justice, the sources and their interpretation, rights and duties and so on. The second part begins with an historical introduction to Greek civil law, but it also includes a discussion of the nature of civil law in general, both in the conceptual and comparative sense. Part three is concerned with the "General Principles" of civil law, meaning a discussion of the rules of law incorporated in the general part of the Greek Civil Code of 1946. It should be noted that the book does not cover the complete course of lectures which discuss also the remaining branches of Greek civil law, commercial law and public law. On the other hand it comprises a jurisprudential analysis of the aims and development of legal science, in particular the philosophy and sociology of law.

The value of introductory books has been frequently debated. Indeed there can be few tasks as difficult as the writing of a book that stimulates the learned yet is suitable for beginners. Professor Vallindas has succeeded in solving this problem by combining his profound scholarship and erudition with an almost classical simplicity of style. Perhaps the most interesting part of the book is that dealing with the general legal notions. The learned author's ability to translate some of the most abstruse problems in jurisprudence into simple language commands our admiration; for example, in discussing the question whether compulsion is an essential element of the definition of law, he writes that whereas most legal rules are in form and substance compulsory, compulsion is by no means a necessary pre-condition of the notion of law (p. 8). Professor Vallindas shares with other scholars like Ripert the modern predicament, namely how to wed extreme positivism, which the scientific method demands, with an idealistic outlook. In this respect he is, perhaps, less successful and, no doubt, he bears his audience in mind when he attempts to reconcile the demands of abstract justice with the need to obey the established legal order (p. 20), or when he denies the existence of natural law (pp. 17–18), yet he recognises the influence of the moral law and the idea of justice (pp. 16–17). The discussion of the sources of law and of those legal problems which are closer to legal practice is outstanding. His comments on the application of law and the interpretation of the sources are always illuminating and of the greatest interest to the comparative lawyer. Although the strong influence that German scholarship has exercised on Greek legal science in general is manifest—not least in the extensive use of the conceptualistic method associated with the Pandektists—it is refreshing to find that the learned author's approach is by no means one-sided. Thus, whereas the reader will come across the mysteries of *objectives Recht* (p. 39) and the notion of the *Rechtsgeschäft* (p. 94)—"is it a valuable conquest of the human mind or is it an aberration?" Professor Lawson asked recently—he will also detect a strong sociological outlook

(*e.g.*, p. 35) supported by an awareness of the English legal concepts and technique. Fortunate are the students whose legal training starts with the knowledge of the methods and terminology of both Continental and English law.

There are, of course, points of detail which may be subjected to criticism. Thus, it is sometimes more profitable, even in an elementary book, to avoid providing an easy solution—which is bound to represent the author's point of view, however sound it may be—to controversies that divide the learned. For example, how far is the doctrine of abuse of rights, incorporated in Art. 281 of the Greek Civil Code, an unmixed benefit? (pp. 73–74). The analysis of *causa* does not suggest how intractable this concept has been in modern law (pp. 102–106). English lawyers will note once more how in countries with a written constitution political rights tend to assume the character of legal rights (pp. 50–56). For the student of comparative law perhaps the most impressive part of this work is the analysis of the general part of the new Greek Civil Code (pp. 80–139) which admirably blends the most mature fruits of Continental scholarship with a deep regard for the traditions and spirit of Greece in the field of law.

Possibly this review has taken more space than is normally devoted to books written in a foreign language. In this instance, however, there is the justification that few elementary books can boast of setting out the general principles of the law in a manner enabling the student to acquire a good grounding in comparative legal concepts, method and outlook, while at the same time introducing the student to all the essential questions of legal theory at such a high level of scholarship. Professor Vallindas has written an admirable introduction to legal science and it is only to be regretted that the language in which it is written will not allow it to circulate widely outside Greece.

A. G. Chloros.

Learning the Law. By Glanville Williams, ll.d., f.b.a. Sixth edition. [London: Stevens & Sons, Ltd. 1957. 220 pp. 13s. 6d. net.]

Six editions in twelve years indicate the popularity which this little book has achieved. In this edition there is little substantial change from the fifth edition—which will occasion little surprise, since much of the advice is timeless in quality—but the opportunity has been taken to note the recently created Crown Courts at Liverpool and Manchester and the relevant recent legislation and literature.

There is no doubt that this book could be read with profit by all students. One wonders, however, whether Dr. Williams is not seeking to cater for too wide an audience. Thus Chapters 1–5 on Divisions of Law and Methods of Study are for the absolute beginner; Chapter 13 on Careers, primarily for the anxious third-year man; while Chapter 7, which sets out the problems of statutory interpretation with admirable clarity, might be required reading for a course on jurisprudence. This is perhaps the price we must pay for having so much information conveniently within two covers; the problem is rather to ensure that the student continues to refer to it throughout his course.

The problems of teaching law have been much canvassed of late. The student, however, has to live with the present whatever its imperfections and the chapters on methods of study are therefore of particular interest. There can be little doubt that the average student wastes much time through inefficient methods and that he could profit from the advice here given. It is perhaps permissible, however, to wonder how far such advice can be given irrespective of the industry or intelligence of the individual, nor is it always clear that such advice should be given. Basically the method of work must

conform to the end in view; sometimes that end may be the passing of an examination with the minimum of effort and even if one knows how this can be done, it is not necessarily desirable to broadcast it. Dr. Williams, rightly it is felt, does not attempt to cater for this audience and thus ignores for instance the perennial student question "must I cover all the syllabus?" For those who seek both to pass examinations and to acquire professional expertise or a liberal education, the problems of technique are more difficult. To some extent everyone should devise his own methods—but he should read this book first.

In sum this is an invaluable aid for the beginner and has been prepared with the care which one associates with the author's name. There are a few minor errors: "as" on page 41, footnote 11, line 15, should be "was"; the reference to *London Street Tramways* v. *L.C.C.* on page 81 should be [1898] A.C. 375 and Judge Gordon Clark gains an extra "e" to his name on page 194.

M. P. Furmston.

Renton and Brown's Criminal Procedure According to the Law of Scotland. Third edition. By F. C. Watt, Q.C., M.A., LL.B., Sheriff of Caithness, Sutherland, Orkney and Zetland. [Edinburgh: W. Green & Son, Ltd. 1957. 452 and (appendices) 101 and (index & tables) 62 and 43 pp. £5 10s. net.]

Renton and Brown has had a varied career. It started as something of a procurator fiscal's *vade mecum*. In its last two editions it has, as a result of a process started by the present Lord Justice-Clerk, undergone a partial transformation into a textbook of general principle. The partial nature of the change is not an indication that the Editors have undertaken their task half-heartedly. They have deliberately tried to achieve the double purpose of preserving the original character of the book and also of making it meet a different need. That course has obvious risks, but is no doubt a necessary one in the circumstances of law-publishing in Scotland. The greatest danger is that neither of the two main groups of readers would be satisfied. Happily, on the whole, that danger has been avoided. Certainly the book has not lost its practical merits. Not only does it give a clear and up-to-date description of procedure to those who have to work the system, but it also gives a remarkably good picture of the system as a working model to those students who lack practical experience. In this it goes somewhat beyond procedure; a great deal is said of the actual handling of a case which is of considerable value.

Similarly, in so far as the book is one of general principle, it goes well beyond any narrow definition of criminal procedure and does much to satisfy the inquiring reader. Any reservations there may be spring from the fact that the book does go so far. There are some references, as in connection with *Reid* v. *Nixon*, 1948 J.C. 68, to experience elsewhere, but there is no uniformity in this. Indeed, this is a field where such comparisons may be dangerous; the legislation involved in *Reid* v. *Nixon* itself was dealt with differently in England and Scotland. Yet if some such references are made, one looks for others, *e.g.*, in connection with the criminal acts of corporate bodies. Again, there are instances where references could well be added to periodical literature—such as the article by Mr. Elliott on *Greenhuffs'* case and its developments in (1956) 68 Jur.Rev. 22. It can be said that to make such points, or to ask that at times the reader might be given more discussion of, or substance about, particular cases, is to ask that the character of the book should be changed so that its original purpose might disappear. Yet such discussion is there and is admirably and succinctly set out both in regard to particular cases, *e.g.*, *Downie* v. *H.M. Advocate*, 1952 J.C. 37, and in regard to particular topics, such as oppression. It is possible that in a future edition some rearrangement might help. The book starts with general subject-matter, and

running through it are general principles which call for the type of treatment discussed. It may be that greater segregation of such material would have emphasised the merits of this edition, and might help another. Certainly some of the valuable portions of the book might gain in emphasis and be less likely to be overlooked by the inexpert.

When all is said, the present edition achieves so much that one should hesitate to quibble. The book is very much alive; the editing has been done with equal care and skill. For both its purposes the new edition is greatly helped by the elaboration of the tables and index which has occurred. The latter in particular is both comprehensive and easy to use. The need for such an index to a book of this type is obvious. It is not always that the need is so well met.

J. D. B. Mitchell.

Yearbook of the International Law Commission 1956. [New York: United Nations; London: H.M.S.O. Vol. 1, 291 pp. 22s. 6d.; Vol. 2, 302 pp. 22s. 6d. net.]

According to Article 13, paragraph 1 (*a*) of the Charter of the United Nations "the General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." With this objective in mind, a Resolution was adopted in 1947 creating the International Law Commission with the twofold aim of developing and codifying international law, tasks the border-line between which is by no means always clear.

The Commission adopted an agenda of labour which covered such items as treaty-making, arbitral procedure, nationality, rights and duties of States, immunities, the principles of international law recognised in the Nuremberg Charter and Judgment and, associated therewith, offences against the peace and security of mankind. Of all its tasks, that which has most nearly reached completion is a draft on the law of the sea which was considered at a governmental conference at Geneva in March, 1958.

According to the Statute of the Commission, its members are to be chosen for their "recognised competence in international law" and many of the reports issued as working papers and prepared by individual members of the Commission are of value to students of international law, both as indications of what the present state of the law is regarded as being, and of the trends that at least some experts regard as being desirable. Unfortunately, it has not been excessively easy to obtain this raw material of the Commission's work, or of the discussions that have taken place on these reports, for they have only been available in a limited way in a mimeographed form.

The drawbacks of this method of publishing were appreciated in the General Assembly, which resolved at its tenth session that the summary records of the Commission and its documents should be made available in a more permanent form, and the *Yearbook of the International Law Commission* is intended to give effect to this purpose. From the first volume of summary records it is amusing to note with what seriousness some among those who are described as possessing "recognised competence in international law" discussed the proper name to be given to this publication. Professor Krylov favoured "Yearbook," Professor Zourek advocated "Documents" and Mr. Edmonds "Proceedings." It is also interesting to note the somewhat offhanded way in which some of the members of the Commission view their duties. When the session opened only nine of the fifteen members were present, and from then on the numbers fluctuated, never reaching the full complement, although for a large part of the session fourteen members were in attendance. Another defect that becomes clear from having the reports in this more permanent form is the cavalier way in which the Secretariat of the United Nations prepares

the necessary documentation. At this session the necessary French translations were not available and, therefore, in the words of the Rapporteur on the Régime of the High Seas and Régime of the Territorial Sea, "the order of discussion would be dictated solely by practical considerations."

In view of the Geneva Conference there is no doubt that the decision to make the records and documents of the Commission more readily available and in a permanent form could not have come at a better moment. In 1956 the Commission finally adopted its draft Convention on the law of the sea and anybody wishing to understand that Conference, and the background to some of the views put forward, must be grateful to the United Nations for having provided the raw material for following the course of the discussions and for providing in the records a commentary thereon by some of the leading experts of the day.

While it might be too much to ask that all the records and documents of preceding sessions should be made available in the same form, it is to be hoped that those who are responsible for allotting funds for United Nations publications might be persuaded of the value and advantage of issuing in the same form at least the reports of the various Special Rapporteurs whose researches have so far only been available in mimeograph, and which are at present, of necessity, consigned to limbo.

L. C. Green.

Trials of Timothy John Evans and John Reginald Halliday Christie. Edited by F. Tennyson Jesse. [London: William Hodge. 1957. c and 379 pp. 30s. net.]

What makes the great and lasting value of the *Notable British Trials Series* is that these volumes enable the reader, any reader, to form a complete picture of the evidence upon which the jury found their verdict in certain criminal matters of importance or notoriety. Had the full verbatim reports of the proceedings against Evans, and subsequently against Christie, been public property earlier, the fierce controversy round this most unfortunate matter—which coincided with the period during which agitation for and against the death penalty was reaching its height—would at least have been based on accurate knowledge of what became known in court. As it happened, the editor of this volume, Miss Tennyson Jesse, informs us, applications from reputable persons for transcripts were "refused" even after the rush for copies for those concerned with the Scott Henderson inquiry was over.

The facts as we now possess them are of course vastly different from those which were laid before the jury when they sent Evans to the gallows on January 12, 1950. It was the discovery of Christie's many victims three years later which shed a wholly new light on the events at 10, Rillington Place. But while it seems certain that Evans would not have been convicted if the true character of the chief witness against him had been recognised at the time, there is still no telling whether Evans was or was not an innocent man when he was hanged. Was he responsible for the death of his wife and his child, or what was his share in their destruction? Miss Tennyson Jesse, in her lengthy and somewhat rambling introduction, considers the various possible theories and arrives at the result that none of them resolves all doubts: "each," she says, "leaves something unaccountable." For herself, she thinks it "more likely" that Christie, and not Evans, killed the young woman and her child. To some, this view of the matter will have gained further support from Mr. Peter Baker's report of his interview with the Roman Catholic chaplain at Pentonville, which appeared in a letter to *The Spectator* on July 12, 1957. But certainty on this point we have none now, nor are we ever likely to have.

There is no comfort in this. On the contrary; it is the most terrible and disquieting aspect of the whole affair. An innocent man may have been hanged,

and if that were not in itself bad enough, it is now obvious that something similar may at any time occur again, with nobody any the wiser. From the full account and transcript of the trial now published it is plain that Evans had a perfectly good and to all appearances fair trial. There was nothing weak about the case against him—Miss Tennyson Jesse in her Introduction calls it "overwhelming" before Christie was known to be a strangler—and there is nothing seriously to suggest that he was not treated in accordance with the high standards we set ourselves when dealing with any prisoner in the dock on a major charge. The judge seemed to have little doubt about his guilt; the jury were out for only 35 or 40 minutes to find their unanimous verdict. It is a most anxious question which every reader may put to his conscience upon reading the transcripts of the Evans trial whether, as a juryman and on the evidence before him, he would have held out for a verdict of "not guilty."

The Evans trial was at the time overshadowed by another murder trial far more calculated to arouse public curiosity and speculation; the execution of the young Welshman excited little notice, and certainly no outcry. It seemed as plain a case as any until Christie was implicated. Can any reader say, in the face of what he reads in this volume, that a miscarriage of justice of the most serious kind could not have happened in our legal system without causing the slightest suspicion? In the face of this thought it strikes me that Miss Tennyson Jesse makes it rather easy for herself when she writes: "Civilisation is founded upon people telling the truth and there is no one to blame, at the trial of Evans, except Evans himself for lying and lying and lying."

H. A. HAMMELMANN.

THE RENT ACT, 1957. By R. E. MEGARRY, Q.C. [London: The Solicitors' Journal. 1957. 39 pp. 5s. net.]

THE RENT ACT, 1957. CURRENT LAW GUIDE No. 13. By ASHLEY BRAMALL. [London: Sweet & Maxwell, Ltd. 1957. xiv and 203 pp. 12s. 6d. net.]

SHAW'S GUIDE TO RENT CONTROL AND THE INCREASE OF RENTS. Second edition. By QUENTIN EDWARDS. [London: Shaw & Sons, Ltd. xxi and 225 pp. 22s. 6d. net.]

RENT ACTS MANUAL. By ASHLEY BRAMALL. [London: Sweet & Maxwell, Ltd. xxxi and 449 pp. 37s. 6d. net.]

THE Rent Act, 1957, contains twenty-seven sections and eight schedules, is larger than any other two Rent Acts put together, and there can be very few persons who are not intimately affected by it.

Mr. Megarry's book, or booklet as he modestly calls it, contains a reprint of articles which appeared in the *Solicitors' Journal*. His aim is to show what is the general broad intention of the legislature, the "general nature of what Parliament has done," to use his own words from the foreword. The lucidity of Mr. Megarry's style is too well known to need praising here; suffice it to say that this is undoubtedly the best short introduction to the subject.

Mr. Bramall's *Guide* possesses almost as many pages as Mr. Edwards's edition of Shaw's *Guide*, but there is a marked difference between the two books. The patient student, anxious to read all that has been written, would

be advised to start first upon Shaw. In Shaw he will find a brief introductory chapter, appendices on gross and rateable values, and numerous examples throughout the text. Mr. Bramall's *Guide*, on the other hand, is severely practical. It is a work of reference, rather more detailed than the word "Guide" suggests. Its slim format will appeal to the busy practitioner who wishes to carry it around with him. In addition it contains the texts of the Act itself and the Regulations.

Mr. Bramall's *Manual* is the largest and most detailed of these four books. It contains a chapter on "Dwelling-houses within the Acts," an invaluable discussion, for the question whether a house comes within the scope of the Acts is often as difficult to answer as questions relating to the effect of the Acts upon that house. This is, in truth, a treatise upon the whole system of the Rent Acts. For although the 1957 Act has made much previous learning obsolete, the Act depends upon the structure commenced some forty years before. And until Parliament can be convinced that piecemeal legislation raises so many difficulties, and codifies the law, reference to the earlier statutes is still obligatory. Mr. Bramall is to be congratulated upon an excellent manual, furnished with such of the earlier statutes as are still relevant, and most attractively set out.

Allister Lonsdale.

The Landlord and Tenant Acts, 1927 and 1954. Second edition. By Lionel A. Blundell and V. G. Wellings. [London: Sweet & Maxwell, Ltd. 1957. xxiv and 364 pp. (including index). 42s. net.]

The first edition of this work (reviewed at (1956) 19 M.L.R. 118) was published shortly after the passing of the Landlord and Tenant Act, 1954. It quickly proved its worth as a guide to the law of landlord and tenant as amended by that Act. The new edition has been skilfully prepared in the light of experience of the working of the 1954 Act and of the numerous reported decisions upon it. Summaries of these decisions and of certain other relevant cases are included in a new appendix, which should be useful on those many occasions when reference to the full report of a case is either inconvenient or unnecessary.

With this edition the authors and publishers have been unlucky in two respects. First, the edition as originally published included a chapter on the protection of residential long leaseholders under Part I of the 1954 Act; and with the passing of the Rent Act, 1957, this particular chapter became very quickly out of date. Secondly, the edition as originally published set out in an appendix the Landlord and Tenant (Notices) Regulations, 1954, as amended; and those regulations were replaced by consolidating regulations soon after the date of publication. This work also appears in a different binding as a supplement to Woodfall on *Landlord and Tenant*; and, in that form, because the date of publication was later, these two points were satisfactorily dealt with, the discussion of *residential* tenancies being relegated to a second volume of the supplement.

As a textbook of the law relating to business tenancies this second edition is an admirable piece of work.

Leolin Price.

Introduction to Income Tax Law, Canada. By Francis Eugene La Brie, b.a., ll.b., ll.m., d.jur., Associate Professor in the School of Law, University of Toronto; with the assistance of Marcel Belanger, m.a., c.a., Secretary of the Faculty of Commerce and Professor, Laval University. [CCH Canadian Ltd. 388 pp. $7.50.]

Silke on South African Income Tax being an exposition of the law, practice and incidence of income tax in South Africa. By A. S. Silke, m.com.(Hons.) (Cape Town), c.a.(s.a.), Lecturer in Taxation at the University of Cape Town. [Juta & Co. Ltd. 1957. 828 pp. £8 2s.]

Both these books deal with systems of income taxation which have much in common with the system now in force in the United Kingdom. Moreover many British individuals and companies have taxable income arising in either Canada or South Africa. These books are therefore likely to be consulted by those who, without requiring a detailed knowledge of the whole field of Canadian or South African income tax law, require a working knowledge of the law on a particular topic.

Professor La Brie's book is intended as a student's textbook. Without an accurate knowledge of Canadian tax law, it is not easy to say for certain, but in the opinion of the reviewer this book should serve that purpose admirably. For example, in dealing with the topic, which also gives rise to some difficulty in Great Britain, whether gains realised by a purchase and resale are income or capital profits, especially in the case of an isolated transaction, the author gives first of all a summary of the facts of some sixteen or so cases where the profit was held to be income, and of some eight cases where the profit was of a capital nature. Then he attempts to find some distinguishing feature between the two lines of authority, and does this in such a way as to stimulate the reader's curiosity. After reading this part of the book no student could possibly consider tax to be a dull subject, or fail to want to examine the topic further. While the author does not intend his book to be used by the practitioner, it is nevertheless sufficiently detailed, and gives enough authorities, to be of value to the practitioner who seeks, not a complete exposition of the law, but a guide which can give him the rules on the topic in hand with the minimum of delay, and the authorities which he may then consult himself.

Mr. A. S. Silke's book is a more substantial work, in that it is primarily a work of reference, which deals with all aspects of the taxation laws of South Africa. It contains all the relevant legislation, including double taxation agreements, preceded by an exhaustive treatise illustrated by numerous examples. It seems to be the South African equivalent of *Konstam* and *CLITAS,* in one volume. From the point of view of the reader in Great Britain, who has a point of South African tax law to examine, it is an invaluable book. One goes to it with no more than a general idea of the name of the tax one is looking for, and one finds a lucid statement in the text, complete with references to the statutes and ordinances and decided cases, and an example worked out in figures. It is a book that should be found useful by lawyers, accountants and business men.

D. C. Potter.

An Estate Duty Notebook. Second edition. By G. Boughen Graham, ll.b., of Lincoln's Inn, Barrister-at-Law. [The Solicitors' Law Stationery Society, Ltd. 1957. 141 pp. 17s. 6d. net.]

The standard textbooks on estate duty are often considered by practising solicitors to be too expensive and too detailed. On the other hand the account of estate duty to be found in a book dealing with probate may be inadequate. The solution, for the practitioner who finds himself in need of an accurate but concise statement of the law and practice, may well be to acquire Mr. Graham's book. To say that this book is neither for beginners nor for specialists is not to criticise it, but only to define its scope: it fulfils admirably its appointed task, to provide a notebook to assist the practitioner in dealing with the estate duty problems which arise in the administration of the ordinary small or medium-sized estate. It does not contain the relevant statutes, or hints on avoidance, or discussion of well-known difficult points; notwithstanding these omissions, indeed because of them, the book is ideally suited for the practitioner to keep at his elbow when dealing with estate duty in the course of administration. It is both lucid and practical. There is a good index, and it is generally possible to get on to any point of law with the minimum of delay.

D. C. Potter.

Factory Law. Sixth edition. By H. Samuels. [London: Stevens & Sons, Ltd. xxx and 734 pp. £4 10s. net.]

The scope of this book will be well known. In large type and on thick paper, which adds considerably to its bulkiness, it contains a reprint of the Acts and the Orders.

The Lead Paint Regulations, 1927, referring to the painting of buildings with lead paint, have been omitted. The Index says, "Lead Paint Regulations, page 684," on which page, however, there is set out the Herring Curing Welfare Order, 1927. The dozen or so pages of the Introduction headed "Principal Changes in the Law," need to be used with caution, for these do not refer to the changes which have ensued during the six years since the last edition was published. They consist, in fact, of a comparison of the law before and after 1937, the present value of which may be doubted.

Allister Lonsdale.

Regulation of Employment and Industrial Conciliation in South Africa. By M. Schaeffer, b.a., ll.b. [Cape Town: Juta & Co., Ltd. 1957. £6 2s. net.]

Industrial Laws of South Africa. By Alan de Kock. [Cape Town: Juta & Co., Ltd. 1956. £6 2s. 6d. net.]

Both these works are concerned with industrial law but they differ considerably. Schaeffer is really the fourth edition of a work first published by the author in 1934 under the title *The Industrial Conciliation Act.* Its scope has now been broadened to incorporate the relevant parts of the Native Building Workers Act and the Native Labour (Settlement of Disputes) Act and certain other statutes touching on conditions of industrial employment. Schaeffer is designed primarily for the lawyer and contains quite full

discussion of such matters as the definitions of "white," "coloured" and "native" and the meaning of the term "sufficiently representative" in relation to a trade union.

De Kock, a new book, written by an attorney and director of the Midland Chamber of Industries, seems to be aimed partly at the employer without legal qualifications and contains 207 pages of analysis and summary of the main industrial statutes followed by 321 pages giving the text of several of the statutes and regulations made under them. Both these books are good of their kind and can be recommended to those, not all lawyers, who are interested in industrial aspects of apartheid. The practising lawyer may find Schaeffer the more helpful of the two, but de Kock covers the Factories, Shops and Offices and Apprenticeship Acts in more detail.

A. M. HONORÉ.

Books and Publications Received

THE AMERICAN JOURNAL OF LEGAL HISTORY, Vol. 1, Nos. 1 and 2, January and April, 1957. 102 and 196 pp. Published by Temple University School of Law, 1715 North Broad Street, Philadelphia 22, Pa. Annual Subscription £3, individual parts 16s. 6d., from Sweet & Maxwell, Ltd.

ASPECTS OF ENGLISH EQUITY. By SIR RAYMOND EVERSHED, M.R. The Hebrew University of Jerusalem Lionel Cohen Lectures, Second Series—January, 1954. 52 pp. Oxford University Press (Magnes Press). 5s. net.

LAWS AND REGULATIONS ON THE REGIME OF THE TERRITORIAL SEA. United Nations Legislative Series. 811 pp. United Nations, New York, 1957. 50s. H.M. Stationery Office.

1958 SUPPLEMENT TO INDUSTRIAL LAWS OF SOUTH AFRICA. By ALAN DE KOCK. 111 pp. Juta & Co., Ltd. Agents in U.K.: Sweet & Maxwell, Ltd. 23s.

INTERNATIONAL POLITICAL SCIENCE ABSTRACTS, Vol. VII, No. 4, 1957. Abstracts of articles published from July to September, 1957. BASIL BLACKWELL, Oxford.

KONSTAM'S INCOME TAX. Cumulative Supplement to the Twelfth Edition, No. 5. By J. E. VINELOTT, B.A. xviii and 87 pp. Stevens & Sons, Ltd. 1958. 10s. 6d. net.

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1949. Summary Records and Documents of the First Session. 312 pp. Vol. II, Documents of the Third Session. 146 pp. United Nations, New York, 1956 and 1957. 22s. 6d. and 11s. H.M. Stationery Office.

JUSTICE IN HUNGARY TODAY. Third Report of the International Commission of Jurists on The Hungarian Situation and the Rule of Law. September 1, 1957–January 31, 1958. 72 pp. International Commission of Jurists, 47 Buitenhof, The Hague, Netherlands.

GENOSSENSCHAFTEN UND GENOSSENSCHAFTSRECHT IN ITALIEN. WOLFGANG KLINGBERG. 141 pp. Veröffentlichung des Instituts für Genossenschaftswesen an der Philipps-Universität, Marburg/Lahn. 1957. D.M. 8,60.

GENOSSENSCHAFTEN UND GENOSSENSCHAFTSRECHT IN FRANKREICH. DR. GERD EICHHORN. 224 pp. Marburg/Lahn. 1957. D.M. 12,90.